Brief of Carter for

United States Supreme Court

Q. S. Churchill
GEORGE M. HASTINGS, ATTORNEY GENERAL, ET AL.,
Appellants,
vs.
OLIVER AMES, ET AL.,
Appellees.

Filed Feb. 29, 1896.

No. 590

Q. S. Churchill
GEORGE M. HASTINGS, ATTORNEY GENERAL, ET AL.,
Appellants,
vs.
GEORGE SMITH, ET AL.,
Appellees.

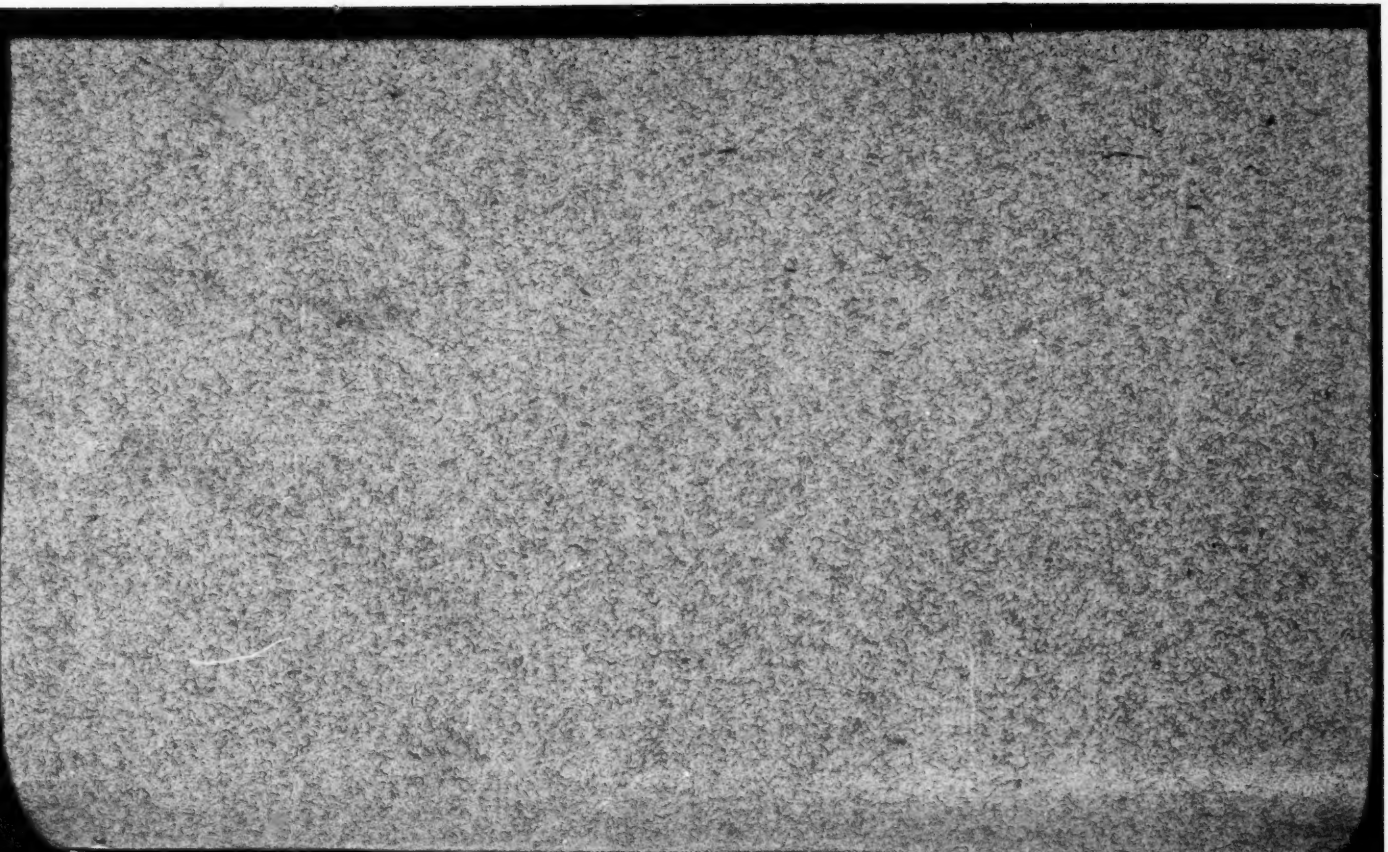
No. 591

Q. S. Churchill
GEORGE M. HASTINGS, ATTORNEY GENERAL, ET AL.,
Appellants,
vs.
HENRY L. HIGGINSON, ET AL.,
Appellees.

No. 592

BRIEF FOR APPELLEES.

JAMES C. CARTER,
Of Counsel for Appellees.



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These suits arose out of attempts on the part of the State of Nebraska to prescribe the compensation which railroads operated in that State shall be permitted to exact for the carriage of goods.

The attempt is made through the instrumentality of a law enacted by the Legislature of that State,

and approved April 12th, 1893, entitled, "An Act to regulate railroads, to classify freights, to fix *reasonable maximum rates* to be charged for the transportation of freights," &c. This law did not leave it to a commission to determine what rates should be established, but itself effected the classifications of goods, and specified rates limiting the compensation which might be charged.

It scarcely admits of doubt that the *purpose* of the Legislature was not to fix *maximum* rates which might operate to prevent extortion, but to compel the railroads to carry goods upon terms which, in its opinion, the farmers and other people in Nebraska could afford to pay. The legislature, apparently, knew that such rates were scarcely sufficient to pay the expenses of operating some roads, and, among them, those recently constructed; and therefore relieved the latter from the burden of complying with the law until the year 1900, showing the prudent husbandry which cultivates the plant until its fruit is ripe for the harvest. It would seem at first a species of fatuity calculated to destroy the very object in view, to confine other and older roads in Nebraska to rates which would not pay operating expenses, and thus run the hazard of *killing the goose*, but the legislators were quite within the boundaries of wisdom. They did not believe that any road would really be forced into bankruptcy and death. They had in view the fact that all the roads in Nebraska, however it may have been when they were first constructed, had become parts of great *trunk lines*, reaching through many States and across the continent; they apparently supposed that the wealth and power of these great establishments were unlimited, and that they would in some manner continue to support their dependents in Nebraska. They were not unaware that

this might involve the imposition upon other communities of the burdens from which the people of Nebraska were thus relieved, and the justice of this transfer was, and still is, defended by the assertion that Nebraska has in some manner been selected by the great trunk lines as a *victim* to bear the burdens of others.

This is no place in which to accuse the people of Nebraska of a design to rob those whom they happen to have, or suppose they have, in their power. They are, probably—most of them—fully persuaded of the justice of this legislation, and it would be presumptuous to assert that their motives are less pure or disinterested than those of their fellow citizens in other parts of the country. But the legislature of Nebraska represents, presumably, the average knowledge and intelligence of her people; and it is not unreasonable to say that no community is likely to well understand the nature of those businesses and concerns in which it is not largely engaged. The resistless force of those tremendous competitions, exerted in every imaginable form, against which railroads are obliged to struggle every day and hour in order to maintain themselves—as great, certainly, and probably greater, than that encountered in any other branch of business—is not perceived by rural populations struggling, in their turn, under the pressure of low prices for their products and other misfortunes, and therefore fails to influence their legislation. Any expectation of securing from such sources that justice which can only come from the larger knowledge and wisdom of those whose occupation and duty require them to examine the great problems of a nation's activity in their whole length and breadth must necessarily be disappointed; but we have a right to look to this Court for a consideration, commensurate with their importance, of all

the elements bearing upon the momentous questions involved in these suits.

A general statement of some of the claims asserted in defense of the Nebraska act.

Those who have hitherto defended this legislation have asserted, or tacitly assumed, many different propositions concerning the relations of railroads to the public which should be subjected to scrutiny. These propositions are very pertinent to the discussion, for the act was undoubtedly passed upon the assumption that they were true. Some of them are extremely loose and indefinite, and for this reason liable to be made the vehicle of much error, nor is consistency with each other among their recommendations? Among them are the following:

1. That railroads are allowed to be built for the public benefit, and must, therefore, be made to subserve the benefit of the people; and that any *private* interest which may be involved is of secondary importance.

2. That all people having occasion to need the services of a railroad are entitled to them; and that the compensation required of them must be made to depend, not upon what the railroad can afford to render the services for, but upon what they can afford to pay.

3. That while it may be impossible to ascertain what the cost is for any particular service, it is possible to ascertain the *average* cost of the whole service rendered by a road, and fair to treat this average as the cost of any particular service; and consequently to assume that the cost of each particular service is everywhere the same.

4. That all persons have an equal right to the services of a railroad upon the same terms, notwithstanding that the *actual* cost of the service demanded by one may be much greater than that of the same service demanded by another.

5. That in fixing rates the *value* of the service to the one who demands it is unimportant; but that the one who needs it most, and who obtains the greatest benefit from it, should pay no more for it than he who needs it least and obtains the least benefit from it.

6. That the carriage of goods to and from large and compact communities which furnish large amounts of transportation and thus enable the service to be performed at much less cost are not entitled to the benefit of this natural advantage, but that all parts of the State must be put upon an equality.

There are many other claims upon which this

legislation is defended, but the above are sufficient for the only purpose for which they are now stated, namely, to point out the *first necessity* of this discussion ; namely, *a clear understanding of what railroad business really is, and had become, under and in pursuance of the contracts between the public and the railroad companies at the time when this legislation assumed to deal with it.* To this end the best attention of the Court is respectfully solicited to the following statement, in making which conciseness has been studied :

The business of a common carrier has been pursued since the dawn of civilization. In legal strictness the business is not necessarily done, like other business, by voluntary contract. The carrier is *compelled* to perform the service if it is demanded, and he has the *right* to exact therefor a *reasonable* compensation. What this may be neither party has the privilege of determining for himself, and if they dispute about it, the question is a judicial one which the judicial power must decide. Prior to the construction of railroads two causes had operated to relieve the Courts from the labor of determining the question. In the few cases where there was no competition, or little (for competition is never absent) the *dislike of litigation* would deter any one from delivering goods to be carried *without* contract, and the carrier, in order to get any business, would be obliged to make his terms such as parties would be willing to contract for. In other cases the existence of *competition* settled the matter of price, and all parties would willingly enter into contract for the *lowest*. Under free competition where two or more are struggling to sell the same thing, or render the same service,

the question of reasonable price must necessarily disappear.

Under the operation of these natural laws, the business of the common carrier became precisely like other business; and the interference of either courts or legislatures with it, so far as price was concerned was substantially unheard of. The only effort of either was to carefully *preserve competition*;—by the legislatures, through penal laws against *combination*, and by the Courts, in enforcing these laws and declaring all contracts against competition void. No instance, it is believed, can be found in enlightened times of an attempt by Legislatures to fix prices for the carriage of goods, and very few where courts have been called upon to determine a dispute as to prices; much fewer than in cases of sales of goods, or of services of various kinds other than those of a common carrier.

Rates of carriage, under this system, were determined by their natural elements, the consideration by the carrier of what it would cost him to perform the service, and by the other party of what the *value* of the service would be to him, that is, whether it would be worth the price demanded. Prices necessarily assumed every shade of variety. If a merchant needed goods to be carried to a certain place by land or water, the carrier computed the cost of doing the work; and if he could lessen it by using his necessary means for doing the principal job in carrying other goods for other parties at a less price, even for a greater distance, he would, of course, do so; and the last thing his principal employer would complain of would be that. He would even help to find such additional employment, if by that means he could gain better terms for himself. Merchants would often become their own carriers under such circumstances by chartering a vessel for the price the

owner would exact, and then relieve themselves by filling up with other goods for a greater distance at a much less rate.

Such was the established business of the carriage of goods at the time the construction of railways was first contemplated. And such is its present character all over the world, in cases of carriage by water, or by land where there are no railroads.

It is said that the business of furnishing railway transportation is a proper function of the State, and that it is the duty of the State to provide such facilities. This is not denied. It may even be said that it was the proper function and *duty* of the State fifty years ago, when the feasibility of steam railroads was first made known, to establish them ; and though this proposition may be doubted, we do not care to question it. Discussion concerning the existence of a duty which all know would not, and could not, have been performed is idle and useless. If it had been taken into consideration how would it have been done? The maxim of our Nebraska friends is that all the people are equally entitled to the benefit of these facilities. Would any State have undertaken to build a system of railroads for *all* its inhabitants. *That* all must know was impossible for the simple reason that the people would not, even if they could, have charged themselves with the expense. Should the State, then, have begun by building a road, or roads, between some particular points where they were most needed, and pay the expense by a tax upon all—the only method of raising the money? It would have been equally impossible to procure the assent of the people to such a measure. The alternatives were to do without railroads, or to invite private capital to build them by offering the right

to construct and operate them for the purpose of gain. The latter was adopted.

It is worth while to consider the precise *terms* of the first grants ; for upon them depend the contract effected by its acceptance and the performance of its conditions. They were simply that the grantees of the privilege should have the right to own and possess the structure and equipment and *carry on with them the business of a common carrier.* What the business of a common carrier of goods was was perfectly well known in the law. It was to carry goods for a *r sonable* compensation ; and what this was was *judicial* question, which neither party to the c ntract could determine, but to determine which either could invoke the judgment of a Court. It required no amendment, for the experience of centuries had found it equal to every exigency. No one thought of amending it, or of adding to it safeguards, which, under the system of free competition, had never been found requisite. The first road would immediately be subjected to competition with *other forms of carriage*, and, unless it underbid them, could not gain any business ; and if it should underbid them and gain business which would yield excessive profit, a similar enterprise would speedily compel a division and consequent reduction of it.

Let it be supposed that such a road were found to be making in its first years a profit of twenty-five per cent on its investment, and some merchant had demanded lower rates, and, upon refusal, had gone to the courts. It would have appeared that the road was carrying freight at *less* than the usual charge, and was making the above profit, and the claim of the plaintiff would be that this was *unreasonable.* We think the opinion of the Court would probably have been something like this: "Inasmuch as the plaintiff admits that he procures

the carriage of his goods by the defendant more cheaply than he can in any other way, *he* has little ground for complaint. In respect to the amount of the profit we cannot say that it is excessive, in view of the fact that the grantees of the franchise hazarded their whole investment. If they enjoyed a *monopoly*, we should be inclined to say the rate of charges might be excessive; but, as they are under the conditions of free competition, they will not be likely to retain the advantage longer than will be fairly sufficient to remunerate them for the risk they have run. The natural laws of business where competition is free have hitherto proved to be a sufficient safeguard against extortion."

Let it be supposed that the *State* had undertaken the construction and operation of the first railroad, what rates should it have imposed upon the patrons of the first road? Those patrons, using the arguments employed to defend the Nebraska legislation, would say only so much as was necessary to pay the expense of operation and repairs. But how would this policy be received by the rest of the inhabitants of the State? Could they not justly complain of having been obliged to make up by their contributions a fund to give a small part of the people a prodigious advantage over them? And how would the teamsters and other common carriers regard it. A much larger number of these would be thrown out of employment than would have been had the rates been made under the simple laws of competition. This class of people might say with reason that while they were prepared to put up with the necessary loss attending the introduction of the new facility, they did not see the justice of turning them out of employment at wholesale, merely to give a small section of the State a gratuitous benefit to which it had no equitable right. These arguments would

have been sufficient to justify, if not to require, the State, had it built the road and chosen to operate it, and thereby to engage in the common carrier business, to enter it in the same way as a private person would, as a simple competitor, and aim to make the largest profit it could, and employ such profit in recompensing itself for the burdens it had imposed upon ~~a small section~~ of the people, the majority in introducing the improvement.

We may now follow the history of railroad business until we reach the next problem it presents ; the State having bargained with private individuals to advance their capital for these public *benefits* and stipulated to give them in return the right to carry on with their structure the business of a common carrier in competition with other carriers and left them to sustain, on the one hand, the risks, and on the other, to reap the rewards of competition, now adopts the policy of giving every one the right to build a railroad who is willing to take the risk of the attempt. It passes *general laws* to that end ; that is, it makes a *public offer to all* to give the right of carrying on the business of common carrier with a railroad to any one who will build a road for that purpose. In other words, it now proposes to *encourage* the subjection of its first grantees of railroad franchises, not only to the competition of other forms of carriage, but to the vastly more powerful and dangerous rivalry of the same forms. The first railway, it may be supposed, has now been constructed for two hundred miles within the limits of a single State. Enterprising citizens now see two points between which another road may be built with a chance of profit, which would, however, compete to a greater or less degree with the existing one for a part of its traffic. It is built, and the original road finds it necessary to meet the

rates of the competitor, or abandon that part of its traffic which is competed for. In either case its profits will be diminished, perhaps ruinously so. In the latter case, it might be tempted to increase its charges on the traffic not in competition if it could do so, but as the rates it had already imposed were presumably the highest it could with advantage to itself exact, any increase would defeat the object in view by diminishing the amount of business, and this alternative would not be available. But let us suppose this traffic would bear somewhat heavier rates, the road would very properly impose them, rather than risk the existence of its enterprise. If it went to those who furnished that traffic and consulted them what would they do? Would they go to the legislature and ask it to *prevent* the competition which threatened the continuance of their facilities by enacting a law prescribing common rates for both roads? They would have had too much sense for that. That is a thing which has never been attempted. Moreover it would have been flagrant bad faith on the part of the public which had bound itself by its general offer to all to build roads for the right of free competition, and there would have been no more acceptances of such offers, and railroad extension would have stopped. It would also have been an attempt to deprive that region in the neighborhood of the competing points, of one of the *natural* advantages of their position, which they had the right to enjoy as against the efforts of other communities to deprive them of it by law, not for the benefit of the *whole*, but of other particular places. If the customers of the road outside of the range of the competition had been consulted, self-interest would have advised them, and they would have said that the competition should be met by

giving lower rates to that part of the traffic, so long as *any* profit could be made upon it.

And here we have the first illustration of certain fundamental principles which are generally overlooked, even by those whose intelligence should immediately and always see them, namely, that in every description of business which is subjected to the influence of competition none are entitled to the benefits of *any particular* competition who are outside of the range of it; and that under free competition the price of things, whether goods or services, at any particular time or place is not dependent upon the *cost* of them to the producer, but on the *supply* of them as compared with the *demand*. When the manufacturer of goods has made up a given quantity he *must* sell them or lose them, and if he and his competitors together have made more than purchasers will take at a given price, he must lower the price to a point where they will be taken. The case is absolutely the same with railroad companies so long as they are subjected to competition. They are, in an entirely just sense, manufacturers of railroad facilities. They make a certain quantity. If they are all wanted and more, they can fix their own price, to some extent, but if not, they must accept the best they can get.

Let the history of railroad enterprise be followed another step. The benefits of the line of two hundred miles to those who can reach it becoming conspicuously manifest, other communities wish to secure similar advantages. One at a short distance from the main line finds enterprising citizens who advance the requisite capital, and incorporate themselves and build a *branch* road. They are obliged to exact much larger proportional rates than the main line, for the business is small, but they are able to do it inasmuch as they are under

no rivalry except that from other forms of carriage. The community benefited does not complain of it, for it knew beforehand that this would be necessary, and with this knowledge encouraged the undertaking—perhaps ran in debt to loan money to aid it. The actual *cost* of the service may be small as compared with the price demanded; but the *value* of it to the particular community is much greater. The competition is with other forms of carriage only, and that competition determines the rate.

In another similar instance the original company constructs such a branch, hoping to secure a profit from its operation, and also to procure additional traffic for its main line. Is there any reason why the company should not charge upon this branch line just as much as if it had been built by an independent company. It *will* charge all it *profitably can*. The laws of competition admit the operation of no other motive than the desire of gain. The managers know, of course, that the way to gain the most is to tempt an increase of traffic by making low rates; and that if they make large profits they cannot long hold the advantage, for a new competitor will appear in the field. But still the rates will be likely to be higher than on those parts of the main line where there are *other railroad* rivals. Is there any reason why the Legislature should intervene at this point and suspend the operation of the laws of competition?

Let us now suppose some years to have elapsed under which many branches have been built to the original line, and various competing roads have also been constructed. The rivalry at the points of most active competition has been met, as far as it could be, in the way already indicated, sometimes, perhaps, by making higher rates at points not within the reach of such competition, though this would very rarely

be the case—practically never—for the reason before stated, that it would defeat its own end, and, sometimes, by an increase of traffic and profits by the building of branch roads; but the company finds itself struggling, under the influence of competition, with a great difficulty in making a dividend satisfactory to its stockholders, or equal to that afforded by other investments. It must do something to better its condition. It perceives that, by extending its road fifty miles, although through a region not likely to furnish much traffic, it can reach a point between which and its other terminus there is a large *water* transportation, always much cheaper than land carriage. It can secure this, or a part of it, provided it can meet the water rates by offering terms so low that shippers by water would accept them, the latter being willing to pay something more for the quicker transportation by rail; but the terms offered must be lower even than those at present imposed for a haul over the whole extent of the company's existing line. What should determine the company's action upon the point whether it should extend its road and offer the terms requisite to secure this traffic? Surely no other consideration than that which governs all business carried on under conditions of free competition, namely, whether it will pay or not. And this depends, not upon what it would cost to carry that traffic by rail, if a new railroad had to be built to do it, but upon the *additional* cost to this company of extending its road the requisite distance and the probable additional traffic it would gain. Its present patrons—or at least those of them who had sense enough to understand their interests—would advise them to do it. They might obtain lower rates by it in some instances; none would be obliged to pay higher. Some unscrupulous men

might encourage them to do it with the expectation of afterwards turning round and raising a hue and cry over the enormity of charging more for a *short*, than for a *long*, haul. But no one can doubt that it is the natural and necessary consequence of free competition in business which was the scheme to which the legislature and the people originally and intentionally subjected the business of railroad carriers, and the incalculable benefits of which have been reaped in a marvelously rapid extension of railroad facilities to all parts of the country, and which are enjoyed, on the whole, at a lower price than anywhere else in the world. These low rates of transportation universally enjoyed in this country do not obtain because railroad managers choose to make them so from motives of *kindness*. *They get all they can*, and the reason why they do not get more is *because they can't*. They do not complain of it as being unfair and unreasonable, although they would do so if the rates were fixed just as they now are by the State. They know that *fairness* or *unfairness* has nothing to do with it, or, more correctly, they know that what competition establishes is and must be fair.

The leading features of the railroad system of the United States, as it has thus grown up and been established under every sanction of law and public sentiment, are these:

First.—That the prices of carriage are everywhere fixed, not by the railroads nor by shippers, but by the same imperious power which fixes the price of all other articles or services, namely, the pressure of competition. Against this determination it is

irrelevant to argue justice or injustice ; or, to speak more correctly, the decision of this power is always just. We do not complain of the decision in the case of food and clothing. We have no more right to complain of it in the case of the carriage of goods.

Second.—Railroads charge the highest price they can profitably get, as everyone else does who has goods to sell; and in some instances, where they have no competitors other than teams, they may be under the *temptation* to charge an excessive price. This they could not do permanently, but they might do it temporarily, and before the forces of competition could be brought into play. An excessive price is that indisputably unusual charge for services rendered under similar conditions which reasonable men would declare extortionate. Against this danger there are two sufficient protections:

1. A plain regard for self interest will and does prevent it. Moderate charges yield more profit by the greatly increased business they draw. No railroad could make money by the practice of extortion. A sound policy, perfectly well known to railroad managers, advises them that it is best to tempt and draw out a large traffic by low prices than to try to make a large profit on a small business.

2. No one need pay an excessive charge. The service can be *exacted* at a reasonable price.

It may indeed cost a lawsuit; but so do all other social and business wrongs. The wrong cannot be very great which does not provoke resistance. The extremely small number of actual contests on this point are good evidence of the fact that this abuse is not frequent or extensive.

Third.—Railroad rates exhibit great diversity, and the reason of many of them is not apparent to the observer who does not think of the conditions which free competition works out, and of the way in which the railroad system has grown up.

The *cost* of the service in particular cases has little to do with the making of the charge. What necessarily determines the carrier's conclusion in any case where he is called upon to say whether he will take new traffic offered at a certain price is how much, if any, cost *in addition* to what he is then under he will incur if he takes it.

His final aim is to get such an average rate for *all* his traffic as will yield him a profit. The *proportions* in which all his customers *contribute* to that average are settled by causes absolutely beyond either his or their will. A grocer's customer, who uses much tea and little sugar, would not say to him that he is doing a great injustice by exacting from him a profit of twenty-five per cent. on the tea he buys, and at the same time selling his neighbor sugar at a profit of only five per cent.

Fourth.—There is a common phrase that railroad rates are arranged so as to "get all the traffic will bear"; and this is true; although not in the odious sense which imputes a design to take advantage of supposed necessities in order to exact

an excessive compensation. In its real meaning it simply indicates to railroad managers the stern necessity which limits them to low rates in order to gain or to save traffic. When, in ways already indicated, they seek to gain traffic by competition with water carriage, they ascertain the rate which it is necessary for them to meet in order to secure it. They must take this ~~rule~~ rate or give up the struggle for the business; for it is "all the traffic will bear." At points where there is no competition except with other forms of land carriage, and little traffic at that, they fix rates calculated to build up the country and increase business; for such rates are "all the traffic will bear." If the great agricultural products are so low that farmers can make nothing by raising them and sending them to a market, the railroad man is obliged to make his rates such that the farmer can make something, or he will cease to attempt to raise such products, and the railroad will lose its chief business. He may find it necessary for his own interest to carry the traffic at actual cost, and sometimes even for less, for this is "all the traffic will bear."

Fifth. — In saying that railroad business is subject, like ordinary industries to the stress of competition we do not express the whole truth. They are peculiarly sensitive to it, and much more than most other industries. Resorting to the just analogy heretofore suggested, that a railroad company may be regarded as the *manufacturer and seller* of transportation, some peculiarities which distinguish this from other manufactures should be noted.

In the first place the expense of manu-

facturing as compared with the price of the product is much larger than in other industries. In other industries this expense depends very largely upon the amount of business done; but in this it goes on and cannot be greatly reduced when little business is transacted. Again, the commodity produced by railroads, cannot, for want of a sufficient demand, be stored away and kept for a better market. If it is not sold to-day, because no fair price can be obtained for it, it can never be sold, and yet a large percentage of its cost which has already been incurred and paid must be lost.

These conditions put the managers of railroads under the constant spur of a desire to sell what they have on hand so as not to lose the expense it has already cost. Sellers of other goods always have the alternative, when the price is thought too low, of holding on to them with little additional expense for a better market.

Sixth.—The operation of the laws of free competition in railroad, as in other business, are not unattended with possible mischiefs, but they are infinitely less than would flow from any attempt to dispense with such laws. These mischiefs, so far as prices are concerned, are really reducible to two:

1. There is a possibility that competing roads may *combine* in order to prevent or mitigate the effects of competition. This in the case of railroads is an imaginary danger only. The *combination* may, indeed, be made, and

sometimes even be absolutely necessary to prevent self destruction. But the combination must always find its real interest in an increase of traffic by *low* rates rather than making a large profit by high rates on a decreased traffic. And should an unwise policy (never followed in present times) tempt the imposition of high rates, it would speedily be baffled by the appearance in the field of new roads and new competitors supplied with capital attracted from other less profitable pursuits. That is to say, competition cannot be really escaped by combination in the large businesses which are open to all. Where nature has limited the *supply* of a commodity, as in the case of mines producing the necessaries of life, coal, &c., a combination among all the proprietors may be made effective in raising the price. This is the case of true *monopolies*, which railroads are not.

Perhaps a practical unification of ownership of all great trunk lines of railway may be brought about and all existing competitions be thus destroyed, and there might not be boldness enough on the part of other capitalists to prompt them to arrange a struggle with the new giant; as is supposed to be true with the great unified interests of sugar and petroleum. But combination on such a scale is without mischief so far as prices are concerned. Self interest in such cases can be promoted only by tempting an increase of consumption by offering the lowest possible price.

2. The other possible mischief is the conversion of *open* into *secret* competition; that is

by secretly obtaining traffic by giving to some better terms than to others. This is exhibited in the paying of rebates, or making special private contracts, and thus giving to some advantages not shared by all.

Sometimes this practice is entirely proper and hurts no one, indeed benefits all; as in the case where shippers of bulky articles like lumber may be induced to withhold shipments until the winter season, when other traffic is slack, and not send it when the roads are crowded. The case is different however, when secret bargains are made merely to carry traffic for one shipper at lower rates than for others. This is an unqualified abuse and public and private outrage. It is the last resort in a desperate and deadly competition. All railroad managers abominate it; but there is no rectitude which will not submit to it rather than die.

In respect to both these possible mischiefs the law provides protection. Both practices are, when not justified by reasonable and fair purposes, *crimes*, and punishable as such. It may be said that they are often not easy to be discovered, and therefore, that the criminal law is not a sure safeguard; but this is, to a greater or less degree, the case with all crimes. The fear of punishment will be sufficient to restrain within moderate limits the commission of the offence. It can never become *general;* and so can never defeat the general beneficient operation of free competition.

Some may say that the foregoing sketch omits many of the features presented by the growth and present condition of the railroad system in the United States, and particularly in Nebraska. It

does omit a multitude; indeed, it aims only to present a few of the leading features and such as bear on the present discussion. But lest it be thought that any are omitted for the reason that they would have a bearing unfavorable to the view herein supported, some of those supposed to support the policy of State interference may be briefly noticed;

First.—It is said that the rates in Nebraska are too high. But how can this be? It is not pretended that free competition is not in full operation in that State; on the contrary, it is known that between the main lines an energetic competition exists. Of course, in the sparsely settled regions there is less of it; but if rates were so high that the carriers were making great profits, there would be. Those, who assert that the rates are excessive, must, if they have any foundation for their assertions, know *where*, and between what particular *termini* they are excessive, and how it may be shown that they are excessive. Their theory, so far as they have any, of what makes an excessive rate is a great excess of charge over the *cost* of doing the work. If they have any knowledge of any such excess as this, they must be able to produce an instance of it, and show, in the case of transportation between some particular points, what the cost of performing the carriage is and what the aggregate of the receipts is. But they decline to attempt any such task.

Unable to prove any excess in this way they seek to establish the charge by pointing out that rates in other communities are lower than in Nebraska. Of course they point to older, more thickly settled, and more advanced communities; that is to say, where the work from its magnitude can be done

much more cheaply. It is idle to compare different rates, unless the conditions are similar.

Second.—There is a great clamor by those who seek to reduce rates, to the effect that railroads have been, and are, dishonestly and fraudulently controlled and managed, particularly in the building of branch lines, often useless and unprofitable, and in procuring the sale or lease of them to the main lines, controlled by the very persons who are interested in the branches, upon terms far exceeding their real value, whereby the main roads are hampered with prodigious additional expenditures which bring no income, and lead only to the result of enriching the fraudulent manipulators of such transactions.

These charges are not indeed made in any of the present cases, but they have been so often made by responsible persons that it is reasonable to believe that there is much foundation for them. Probably they are exaggerated, but possibly the extent of them is far greater than is believed or asserted. Of what consequence, however, are these matters unless they affect *the question of rates*, and show that railroad charges are thereby made higher than they should be? No effort is made to select any particular instance, and to prove that in such instance rates are, *in fact*, higher than in others where no such fraud exists; but the *assumption* is made that this *must* be so for the reason that the expenses of the road are thereby increased, and the road is *obliged* to charge higher rates to meet these expenses. This assumption has absolutely *no* foundation. The charges of railroads are entirely beyond their power to control. They charge all they can profitably get in every case, and if by some fraud of managers, or otherwise, their burdens and ex-

penses are increased, their profits are proportionately diminished. The case of railroads does not differ in any respect from that of other branches of business which are open to free competition. Who has ever supposed that a manufacturer could sell his wares for a greater price by increasing the expense of making them, or that a farmer could charge and obtain more for his wheat because some knave sold him his land for twice what it was worth and held a mortgage for the purchase money, the interest upon which the farmer was obliged to pay? These are frauds upon those who are *furnishing the capital* for railroad business, not upon the *public*. Those who suffer by them are the *stockholders* of railroad companies, not the shippers of freight.

Third.—But, perhaps, it may be thought that the most conspicuous omission from the sketch we have given of the growth and present condition of the railroad system is the circumstance that the builders of railroads have, under our laws, the power, or at least, *exercise* the power, of issuing as large a volume of stocks and bonds as they please without regard to the amount actually expended in constructing the road, and that it is impossible to pay interest on a great excess of these securities without charging rates proportionately exceeding the necessary expense of operation. *Over-capitalization*, and *watering of stocks* was the great burden of the argument in the courts below to support the rates of the Nebraska Statute.

This charge of *stock-watering* as applied generally to the incorporation and construction of railroads in this country (there are some exceptions) is perfectly true; but it is equally true of all other hazardous enterprises, and generally true in pro-

portion to the hazard. It reaches the extreme illustration in the case of mines of the precious metals. But nothing could be introduced into this discussion more entirely immaterial. The inexorable laws of business when conducted under free competition, and which can no more be controlled by man than the winds that blow, render all these devices wholly ineffectual to raise the price of any commodity or service. The *cost of production* in the long run, *demand and supply* from time to time, will forever determine it. Did any one ever suppose that an over-capitalized, mining company could obtain a greater price for its gold, or silver, or lead, or copper, than one not over capitalized? Whether a railroad company can make any money or not must always depend upon the cost of building it, the expense of operating it, and the amount of traffic it can command at a given price; and the amount of the capitalization affects no one of these elements. It is said that the managers of an over-capitalized road *try* to make income sufficient to yield a return upon the whole capitalization. Of course managers *try* in all cases to make all they can, and if the possible effect of over capitalization is to make them try the harder, it means, and means only, that it stimulates the competition between them, makes it sharper, and, consequently, *reduces* rates. If a road were built with the nicest economy and no more stock and bonds issued than the actual cost, and yet could not pay an interest on all its bonds, it would be over capitalized just as much as another road, built at the same expense, earning the same amount of net profit, the nominal capital of which had been made twice as large by the addition of an amount of water equal to the expense of construction. If an over capitalized road is competing for traffic with another which is not

so, and other relative conditions are the same, the former, provided its excessive capitalization is in the shape of bonds, cannot compete with the latter. The latter will not, out of pity for the weakness of its rival, graciously yield it business enough to enable it to live, and it must go to the wall and diminish its capital through the process of bankruptcy or otherwise, and start afresh in the race on equal terms with its competitor.

But it is said that some railroads pay a dividend on a large over-capitalization. So do some railroads not over capitalized pay larger dividends than the ordinary returns on investments. Each class of these instances (there are very few at the present day) simply show that the fortunate companies had entered territory where there was an unsupplied demand for such facilities, and where the people stood in great *need* of them, that is to say, where such facilities conferred a great benefit, and were of great *value*. Such things in this world always command an increased price, and ought to do so. In these cases the companies have found what is sometimes called a *gold mine*. If they have, there would seem to be no reason why they should not enjoy the same advantages as other discoverers of such prizes. But, unfortunately for them, they cannot. Gold mines become the *property* of the first discoverer; but not so with gold mines in the shape of railroads. They become the *common property of all* and last about as long as a real gold mine would, if all were at equal liberty to rush in and enjoy it.

Fourth.—The true way of showing that railroad rates are higher than they ought to be is to show that the railroad companies are distributing among their stockholders in the shape of dividend sums

larger than other investments of capital exposed to similar hazards. This would show that somehow or other, free competition was not performing its proper function; and would suggest the possibility that it was somewhere smothered by a *combination* open or concealed, but this cannot be done. It is notorious that the returns are in general lower. Those, however, who support the legislation in question insist that much larger profits are actually made, and they point with apparent triumph to the evidence tending to show (although it is wholly insufficient) that the main lines pay out large sums to supply deficiencies occasioned by the operation of *unprofitable roads*. It is probably entirely true that many roads, or parts of roads, are constructed which are not immediately profitable, and some perhaps never will be. The case could hardly be otherwise in our enormous business of railroad extention, and with the fierce competition for new territory supposed to be capable of supporting large populations, and thus promising future, if not present, traffic. But if true, and so far as it is true in Nebraska, what does it show? Simply this, that these grasping railroads are furnishing transportation to large numbers of the people of Nebraska *at less than cost*—giving them advantages to which they have no just claim; for no community is entitled to railroad facilities which cannot furnish traffic enough to maintain them. Nebraska ought to be extremely grateful for this, for it is not the case of charging a part of the people of that State high rates in order to give low rates to others. A trifling part of the sums requisite to suppy these deficiencies come from Nebraska earnings. They come from the general profits of the companies, and are made up much more largely by the outside traffic. Does anybody in Nebraska really wish, or mean,

that the operation of any mile of road in that State should be discontinued? Very far from it.

It is not benevolence on the part of the companies which leads them to support unprofitable roads. They were built under the hope which will forever move sanguine men that they *would be profitable* from the growth of the country. This hope is not immediately realized; such expectations seldom are; but the only way in which to make such roads profitable is to keep on operating them, and thus help along the settlement of the country, which will eventually make them self sustaining—unless such Legislation as the present is enforced which will ruin all railroads except those between favored termini.

The spectacle of railroads built before they were needed has been the uniform feature of railroad construction in the West. It is the simple and sole explanation of the marvelous rapidity of the advance of the great western communities. It has accomplished in half a century what would otherwise have taken perhaps five hundred years. Whether or not it has been wise is a wide question, and an idle one; for it has been done. It is enough to say that without it Nebraska would now be, and long remain, a wilderness.

Those who think that there are deplorable evils arising out of the present system of railroad operation do not (except those who call themselves Socialists) often concern themselves with the inquiry whether they are in any way different from, or worse than, those which beset other businesses or pursuits, or whether there is any other system, which might originally have been, or now be, substituted. It is not very pertinent to make the inquiry here; but a glance at the possibilities which other schemes offer may not be uninstructive

upon the point whether we ought not on the whole to be content with the present.

One way would have been to relieve railroads from the operation of free competition by giving them exclusive franchises between certain points or within certain territory. It would have been indispensable perhaps under such conditions to reserve in the grants the governmental right to prescribe rates, and revise them from time to time. A reliance on the right of the shipper to exact the service on reasonable terms might not have been effectual when there were no easy and satisfactory modes of determining in suits brought by shippers what reasonable rates were. Under such circumstances it would be for the Legislature to fix the rates, or for commissions created by the Legislature. What a scene legislatures, or the offices of the commissions, would present under such circumstances may be imagined. Most of the legislators would be elected as the paid retainers, either of industries seeking low rates, or of railroads seeking high ones. The commissioners would soon become either political bosses, or owe their places to such bosses. In a word the traffic of lobbies would receive an impetus such as has never yet been witnessed. And the eventual rates would be increased sufficiently to raise the sums necessary to bribe legislators or commissioners, or pay the blackmail necessary to prevent other persons from bribing them. We may imagine, or rather we cannot imagine, how high they would go.

Another way would have been for the government to have undertaken the actual and direct exercise of the franchises both of construction and operation. The cost of construction certainly would not have been less, and probably many times greater; and the cost of operation increased to an extent correspondingly great. But then

how would the rates be fixed? If the cost of the service, or the value of it to the shipper, were to furnish the rate, the problem would be one in the judgment of legislators or commissioners, and we should have again the inevitable spectacle which such bodies present when they are to form conclusions upon which the very existence of important industries depends. The strife would be between different places and different industries. The competition now settled by natural laws would be fought with the weapons of reason where they were available, and with money where they were not. The public treasury would have such defence as it usually has against assault, and the result would be universal corruption, high rates, and an enormous deficit to be paid by taxation.

Against these perils which render the suggested schemes wholly inadmissible, the only other open to consideration would be the construction and operation of the roads by the governments, state and national, upon the same methods as those followed in administrating the post-office system; that is an operation of the roads by the government at rates so low that nobody would find it worth while to quarrel over them, and a payment of the deficiency by taxation, forcing the interests of trade and commerce to accommodate themselves to the condition as best they might. No other mode could be successfully adopted; for the moment an attempt were made to regulate rates according to the cost, or the value of the service, the amounts would be so large that the interests of different places and different industries would be at once vitally affected, and legislatures would be subjected to a strain which no integrity could stand against. Other difficulties in way of such a scheme need not be touched upon, such, for instance, as the distribution of some *millions* of pub-

lic places drawing salaries, and the mannerin which a system of rates controlled, part by the general government, and the rest by forty different state legislatures, could be arranged. But the Socialists are not appalled by any of these problems.

Before passing to the consideration of the Nebraska act attention should be called to another feature of the existing condition of railroad transportation in that State. Nearly, if not quite, all of that business is done by companies whose lines extend very widely outside of the State in nearly every direction, and are greatly prolonged East and West. Their business is made up of transportation, partly such as begins and ends within the respective boundaries of numerous States through, or into, which, their lines extend, and partly such as passes the boundaries of one or more States, that is, *interstate* traffic; which latter item far exceeds that of the purely local traffic within the State of Nebraska. The aggregate business, as thus made up of each of the companies who are complainants in these suits, is nevertheless an *indivisible whole* in which each part is dependent upon each and every other part; that is to say, the local traffic is carried by the same agencies, over the same tracks, by the same engines, in the same trains, and often in the same cars with the interstate traffic. To separate the *cost* of carrying the one description of traffic from that of the other is an utter and manifest impossibility. Any attempt to do this would involve mere conjecture piled upon conjecture. Consequently the determination of the *actual cost to these companies* of any *particular* local traffic in Nebraska, or of the *whole* of that traffic, is, and is, or has hitherto been, conceded by the appellants to be, an absolute *impossibility.* What would be possible, but what has not been

attempted, is to ascertain the actual cost of doing a *particular* local railroad traffic in that State, or of the *whole* traffic taken as an aggregate, if it were to be performed by independent roads, or by a single independent corporation, if it were to do that business and that alone.

As the case actually is, one of two things must be true; either that the present trunk companies are, by reason of their greater profits on other business, enabled to perform, and do perform, the local service at less rates than independent companies confined to local business could perform it for, or that they make *more* from local, than from their other traffic, and thus make the former partly support the latter. It is the necessary consequence of this condition, that if the State of Nebraska controls the *local* rates, it at the same time controls the *interstate* rates. No *assumed part* of an *indivisible whole* can be affected without affecting the whole, and it is needless to add that the exercise of a power to thus *affect* the whole, is the exercise of a power to *destroy* the whole.

It is upon these complicated and prodigiously extended systems of railway traffic built up and now existing under the operation of the constraining forces of free competition to which the governments and the people of the states and nation have intentionally, and by contract, subjected them from the beginning that the Nebraska act of April 12th, 1893, is intended to act. It does not assume to operate upon those systems as *entireties;* for they are, for the most part outside of the territorial jurisdiction of that State; but it assumes to separate into *parts*, what is, by its own nature, inseparable, and act upon that part only which lies within that State.

It is the intention of this brief to avoid all conflict with doctrines which have been actually established by the judgments of this Court. It will not be expected that it will avoid all criticism of the particular language employed in explaining those doctrines, or of the lines of reasoning which may have been employed in supporting them. Such criticism has been freely indulged in by the members of the Court and is necessary. The establishment of the law on points of great magnitude and difficulty is a slow process, and final conclusions can be reached only by successive steps, each in its turn dealing with some particular aspect of the problems.

The present general condition of the law on the questions involved in the present controversy is believed to be as follows:

1. That it is within the scope of the legislative power to establish maximum rates for railroad charges.

2. That this power is not *unlimited;* and that the ascertainment and declaration of its limits are within the province of the *judicial* power.

3. What these limits are is as yet an open question except in one particular; namely, the regulations must be *reasonable.*

4. That they transcend this limit and become *unreasonable,* whenever they operate so as

to take away the *property* of the railroad companies.

5. What rules or principles must be observed in the framing of maximum rates in order to make them *reasonable*, other than the one above mentioned, that they must not take away *property*, is as yet an open question.

6. In particular, the question whether they are not unreasonable, if they *impair a contract* between the railroad companies and the State, and take away *rights resting in contract* is an open question.

7. What rights, *resting in contract*, railroad companies have, as against the State, is an open question.

8. Whether the State can determine by *legislation* the reasonable value of railroad service *as between railroad and shipper*, so as to oust, or to cripple, the jurisdiction of the courts to determine, in some form, that reasonable value, is an open question.

Reagan *vs.* The Farmers' Loan and Trust Co., 154 U. S., 362.

St. L. & San Francisco R. Co. *vs.* Gill, 156 U. S., 649.

It is believed that the present legislation is clearly

shown by the proofs in this case to be invalid within the principles already established by this Court. The rates are *unreasonable* because they take away property without due process of law; and, therefore, it is not *necessary* to determine either of the points above mentioned as being still open. But, at the same time, it is true that those points are directly *raised and involved*, and a discussion of them is relevant, and cannot with propriety be passed.

The *aim and character* of this legislation will, therefore, be a main subject of scrutiny and discussion; but this will properly be preceded by a precise statement of some very material legal propositions believed to be fully established.

POINTS.

First Point.—The *business* of a common carrier of goods at all times before the introduction of railroads, and ever since, has been the carriage of goods for hire. The law attached to this business the *duty* on the part of the carrier to carry all goods which any one might *require* him to carry. It gave him a corresponding *right* to charge for his services a *reasonable* compensation. What was in fact a reasonable compensation is, from its very nature, a *judicial* question, and has always been so treated.

The carrier had, in addition, the common right of all citizens, namely, to *agree* with his customer concerning the amount of his reward. In cases of such *agreement*, the question of *reasonableness* would necessarily disappear.

If there be any exception to this it is confined to cases where the parties stand on such an unequal footing that *extortion* can be practiced, as where one needs a cab in a city, on a rainy night, and there is but one at hand. Such situations call for suitable *police* regulations.

Second Point.—One can become a carrier by railroad only by the permission of the State. What the rights of such a carrier are, *as against the State*, depend upon the terms of his contract with the State by which he acquires the right. Under our system, which allows all to construct and operate railroads upon the same terms, the contract is made by a *public offer*, and its *acceptance*, by performing the consideration.

1. Our system is founded on the policy that it is not wise for the State to undertake, immediately and directly, the business of constructing and operating railroads, but more expedient to provide the public with the facility by invoking the intervention of private individuals with their capital by holding out the expectation of pecuniary gain. Our general railroad laws are *public offers*, precisely similar to the public offer of a reward for the discovery of stolen goods, or of patents to inventors for their discoveries, which offers are accepted by *doing the things* for which the offers are made.

Third Point.—The nature of the *right* gained by the acceptance of such offers is ascertained by the simple inquiry what the *offer* is. In the case of a railroad, where there are no special conditions or limitations modifying the substance of the offer, (and in general, and in our particular cases, there are none) the offer is of *the right to carry on* (with the structure) *the business of a common carrier as it is ordinarily carried on.* And to whatever conditions, either by way of legislative regulation, or otherwise, that business is ordinarily subject, it becomes subject when acquired by a railroad carrier in the manner above pointed out; and it becomes subject, undoubtedly, to such further governmental regulation as the new instrumentality employed may, in the public interest, reasonably require.

Fourth Point.--In the discussions, judicial as well as forensic, concerning the power of State legislatures to regulate railroad rates and other similar charges, while the existence of the *power* has been affirmed, the *nature* of the power, the *place* to which it is *assignable* in the just scheme of government, and the conditions under which it may properly be exercised, have not received the attention to which they are entitled. References have been made to certain employments, such as those of millers bakers, ferrymen, innkeepers, &c., the changes, in which have been made from time to time from an early period the subjects of legislative regulation, and it has been impliedly accepted as law, that these employments, are, *under all circum-*

stances, subject to the interference of government, while other employments and businesses are not; but the reasons *why* this should be so have not been fully sifted. It is time this element which has served as the foundation of the most momentous conclusions should be scrutinized and measured.

We affirm the moderate proposition that the governmental power upon which alone this class of regulations can be defended is the *police power*.

Munn *vs.* Illinois, 94 U. S., 113, 125.

1. The police power finds its principal illustrations in laws designed to secure the personal health, comfort and peace of society and its members, so as to enable the latter to engage in the ordinary vocations of life with convenience and advantage. It represses evil practices and ill-doing generally. It aims to do, as its name imports, about what a wise policeman would do if he were charged with the duty of walking about among men as they are engaged in the ordinary and useful callings of life, and repressing mischievous and unfair practices which every one, except the guilty parties, would agree should not be permitted.

But it acts also on a larger scale. It regulates the construction of buildings, the hours of labor, compels manufacturers and producers to submit their wares to inspection to stamp them, &c., requires carriers to provide safe vehicles and keep them in repair, employers of labor to make the buildings in which their operations are carried on safe and comfortable for workingmen, &c., &c.

2. Language has sometimes been used, for instance in the case of Munn *vs.* Illinois (the determinations in which we do not dispute), which seems to *suggest*, although it by no means so declares, that the exercise of this power, so far as it seeks to touch *prices*, is limited to certain pursuits obscurely defined as "*affected with a public interest.*" This is a misleading phrase. The occupations supposed to be thus affected are such as those of millers, innkeepers, ferrymen, carriers, &c. But what is meant by saying that these callings are "affected with a public interest"? Is it that they are more necessary or interesting to the public than those shoemakers, or farmers, or manufacturers of wares in general? No, but only this: that the facilities afforded by these callings are so necessary that the State might properly furnish them itself, and that the number engaged in supplying them is so *few* that the public is limited in the choice it can make when seeking such services; that is to say, that they are to a greater or less extent *monopolies*, and these are an undoubted field for the exercise of the police power.

But they are not the only field for its exercise; from the very nature of the power it has no other limitation than the *necessities* of society. The order of reasoning adverted to might, with propriety, be reversed when we are considering the extent of the police power; and instead of saying that whatever things are affected with a public interest may be subjected to the regulation of that power, we might better say that whatever *requires* the regulation of that power is *affected* with a public interest.

The primary inquiry always must be whether the *regulation is necessary*. In the undoubted rightful exercise of governmental power we give authority to municipal officers to blow up buildings in cities in order to arrest the progress of a conflagration. We check that extent of speculative business which amounts to mere *wagering*, by making the contracts, in which it consists, void, and even subject the parties to them to penalties. The matters thus dealt with are not affected with a "public interest" in Lord Hale's sense of that term; but they are none the less subjects for the exercise of the police power.

The purchase and sale of wheat, or other provisions, are not thus affected; but were there peril of a famine, and great proprietors had accumulated the whole supply, and were holding it at a price which the people could not afford to pay (a condition hardly possible in present times, but quite conceivable), none could doubt the right of the State to take it compulsorily for a fair price and with it to accommodate the public necessities.

3. It may be suggested that if it be admitted, as is above admitted, that all the callings and businesses of men may properly be made the subjects of police regulation, when the necessity for such interference arises, there must be some body to which the determination of the existence of the necessity must be confided, and that this body must certainly be the one which is clothed with the powers of making the laws.

In general, this is entirely true. It is uniformly and absolutely true under those political systems in which the legislative power is unlimited; but it ceases to be true the moment a constitutional limitation is placed upon it. Another body must then be clothed with a power to review the action of the legislature, or the limitation is wholly illusory. With us that power is in the Courts; and they can enforce the limitations only by limiting the judgment of the legislature upon the question of necessity. They ought, and do, labor to confine their interference within the narrowest bounds; and their way is, not to judge of the necessity in the particular case, provided the case belongs to a *class* in which legislative action may be necessary and proper; but whether *it belongs to a class which it was the intent of the constitution to protect against legislative action*.

4. We need not argue that a legislative act cannot be defended by simply *calling* it an exercise of the police power. The question must be whether it is *really* an exercise of that power, that is to say: whether the legislation is designed to secure, and adapted to secure, some *object* within the scope of that power, or some other one which the constitution does not permit, and which takes away some right which the constitution was designed to secure.

It may be asked what the use is of talking about *police powers*, a term unknown to the constitution, if after all, the real inquiry is (as it in fact is) whether the legislation in-

vades some right which it was the design of the constitution to protect *against legislative* action. Why is it not better to make the simple inquiry whether such a right is invaded? For if it is, the legislation is invalid by whatever name it may be called. This is a fair question. The writer of this brief has no attachment to the use of this indefinite term, *police power*, and employs it only because the modes of legal reasoning on subjects like the present have adopted it in framing their formulas. And it is by no means without recommendations, for it is *descriptive* of the *extreme limits* of legislative action; and as all rights, even constitutional ones, are *more or less* subject to legislative action, it may safely be concluded that if they are protected against these, they cannot be substantially affected by any legislative action whatever.

5. The proposition with which we started under the present point is that the law in question, if defensible at all, is so only as being a just excuse of the *police* power. This will not probably be denied. The defense of all such legislation, from the case of Munn *vs.* Illinois to the present time is, that it is enacted in order to protect the public against *extortion;* by limiting the power of individuals or corporations who have a real, or, as Mr. Chief Justice Waite styles it, a *virtual* monopoly of a facility necessary to the transaction of business, from imposing for the use of it excessive charges. The act is, therefore, one to prevent *extortion*, and regulate *mo-*

nopolies, a typical instance of the exercise of *police* power.

6. The practice of using advantages in order to wring from the necessities of others excessive sums under the pretense of, or by the way of, *price* or *compensation*, is a civil mischief, and may properly be treated, as it often is, as a *crime*. It is most commonly found committed by those who have what is called a *monopoly* of a thing; but any *opportunity* which one man happens to enjoy by which in consequence of the necessities of others he may use to exact money from them is in the *nature* of a monopoly, and pregnant with the same possibility of abuse. If the person enjoying such an advantage makes an undue, unreasonable and oppressive *use* of it, he is guilty of extortion. There are indeed certain *natural* monopolies, such as mines, which the law does not attempt to regulate; these are connected with and form part of the *ownership* of land, and the owner may place such price upon the product of these as he pleases. They are *property* in the eye of the law, and, at least under our constitutional system, can no more be invaded by the regulation of the price of the product than any other description of property.

Other natural monopolies are public franchises which the State grants to private persons, *excluding all others;* and which it should not permit to be *abused*. These are such as ferries and railroads, when operated under exclusive grants, are undoubtedly within

this class. Millers, using water power, have something in the nature of a monopoly and one connected with the land ; but they hold themselves out to the public as willing to serve it at reasonable terms, and the law regards it as extortion (as indeed it is) for them to charge an excessive toll upon those who have brought their grist relying on the expectation thus created.

Other opportunities for extortion are created by *combinations* between persons, such as owners of coal mines, to destroy that *competition* which is the great means by which extortion is prevented.

Other extortions are practiced by *deceits* not readily discoverable by the intended victims. Bakers reduce the weight of their loaves. Knavish grocers give underweights and measures, and such practices may be repressed.

7. A noticeable characteristic of all or most of the extortions which the police power seeks to prevent is their *immorality*. Some of them are flagrantly criminal ; all have a taint of immorality. All might properly be made the subjects of *penal* legislation. Another characteristic is a certain *pettiness*. Fair men will not stoop to them. Those men who do practice them suffer in their reputations and are avoided. Other people decline to have relations with them. Consequently large affairs are not exposed to this mischief.

8. Extortion, as applied to *prices* of things

or services, *means* the *wrongful exaction*, under *color of right*, of excessive compensation. And as it necessarily implies *guilt*, it must and does mean that the sum exacted is, in some way, so *manifestly* disproportionate to the value received that any man having the ordinary use of reason who exacts it must be *conscious* that he is doing wrong. No law could rightfully *punish* a man for insisting upon a compensation which, in the fair exercise of his judgment as to what he could reasonably afford to sell the thing or render the service for, seemed to him to be right. If the price is a fixed *fee*, rightfully established by law, as in cases of *official* compensation, the exaction of *any* excess is extortion and universally punished as such; but if it is fixed only by the rule of *reasonableness* the standard is uncertain, and different results would honestly be reached by different men. In such cases criminality, and consequently *extortion*, are not reached until the excess is such as to be immediately recognizable by reasonable minds.

9. Governmental rules to prevent extortion, whether they consist of penal statutes or the establishment of fixed prices, or rules of common law forbidding a recovery, necessarily assume that the *power of* fixing the price is in the persons selling the thing or rendering the service; in other words, that the price is determined by a mere exercise of their *will*; but what can be clearer than that where the business of furnishing the thing is under the pressure of free competition, such

competition of necessity determines and absolutely determines the price, and that mere human will is powerless. The question of reasonableness, or unreasonableness disappears, and is wholly irrelevant; for what can be the use of exercising the reason upon a subject when its conclusions are wholly unavailing? Whatever, therefore, the *power* of government in such cases, to act upon prices, may be, there is little occasion, or propriety, for its exercise.

The question of reasonable price comes up in the law in two forms: (1) One is in the case of ordinary transactions in business which are under free competition. There the question arises only in the absence of *express contract*. If a plaintiff sues for the price of a thing sold and proves no agreed price, the measure of his recovery is a *reasonable* price; but this does not usually mean a price determined by the exercise of reason on the numerous possible factors which have a possible bearing on that question; but on *one* factor only, namely, the *market* price, where there is one; that is to say, that in law as in fact, competition determines the price. (2) If the business is *not* subject to free competition and there was *no contract*, the case is one of a sort which the laws compels to be rendered for a reasonable price, that price only can be recovered; but the price fixed by competition can not now be appealed to, for it does not exist. The various factors which reason should properly take into account are now relevant.

10. But it may be asked how is extortion to

be prevented or punished (which is only one mode of prevention)?

The true way, where it is practicable, is to subject the business to free competition, under which it becomes impossible and even *unthinkable*.

It may be said that railroads certainly are sometimes free from competitition, as where there is but one available, as in new and sparsely settled regions. But it is not true, in any just sense whatever, that the laws of free competition do not operate here. Such cases simply mean that some enterprising persons have undertaken the hazardous experiment of seeing whether they could not make money by building a railroad and *entering into competition with other forms of carriage*. The farmer was before obliged to go to the expense of keeping a team and cattle, or of hiring from a neighbor and employ his own time in carrying his product. He is now offered a new facility. If it is cheaper he will take it and pay for it, because it is a benefit to him. If it is not, he will not take it, and the road will have no business, and become a loss to its projectors. Moreover, competition is here present in another form, *potential*, it is true, but none the less effective for that; for if a railroad, by its ability to impose large charges, is making much money, others will speedily come into the field, and competition will reduce them.

Those who imagine that railroads have a power to exact what rates they please lose sight of the necessary operation of the all-powerful motives of self interest and hope. The opportunities to make money supposed to be offered by building railroads where

there are none are followed up with the same industry and zeal which are exhibited in other businesses. The actual results seldom equal the expectation, and railroad operators soon find that there is no hope of salvation for them except by *increasing the demand* for their facility; and they have no means of increasing it except by making the price as low as possible, and very often even lower than the cost of the service. They are, from the very necessities of their position, teachers, promoters and propagandists of the doctrine that men should *produce* as few things as possible, send those to a market and supply their other needs by purchasing in a distant place; in other words, they are promoters of *commerce*, which can be advanced only by cheap transportation.

Another form of preventing extortion is by enforcing the rule of the common law, where that rule obtains, forbidding the exaction of an unreasonable price. This is an entirely proper method, but only proper in those exceptional instances in which the law *compels* parties, contrary to its usual course, *to enter into relations* with each other. This applies to those cases where it would be the duty of the State, or its fair province, to supply the facility itself; and, of course, as it would be its duty to furnish it equally to all, it must subject those to whom it grants the privilege of furnishing it to the same burden. As the case where the service is required compulsorily is necessarily the case where the parties cannot, or may not, *agree*, the absence of agreement must be supplied by a rule fixing the compensation, which

can, obviously, be fixed in no other way than by making it what is *reasonable.*

But it may be argued that this rule, from its uncertainty and the difficulty of proof, especially in the case of railroad services, becomes practically ineffective, or nearly so, and that to submit such questions to a court or jury whose determinations as to similar services would be different in different cases, would result in great confusion and injustice. This is fully admitted; and, if there is any necessity, real or even supposed, arising from the practice of extortion, to repress it by positive statutes, this may be done in two forms, one by making it a *penal offense* to exact an *unreasonable* price (for the crime consists in *this* and nothing else), and leaving it to the judicial power to determine in particular cases what an unreasonable price is. Of course there would be no reason for limiting such a penal law to the case of a railroad carrier. Extortions are just as possible, just as censurable, just as much the proper subjects of the police power, and far more common, in other branches of business. No one can state a good reason why the man who exacts an unreasonable price for the carriage of goods should be punished and the one who does the same thing for a pair of trousers allowed to go free.

But it will be said that this method would introduce all the difficulties of determining what a *reasonable* price was. This is partly, but not wholly, true. The question would now be whether, taking into consideration all the circumstances of the case and giving to each the weight which good sense and

reason dictate, the price exacted was so *clearly and palpably* excessive that no man of ordinary sense could have exacted it *without being conscious that he was doing wrong.* If he had only committed some error of judgment by honestly allowing to some one or more elements an undue weight, he could not properly be convicted of crime. But the difficulties in this case, whatever they may be, are, in their very nature, not *legislative*, but *judicial;* and any attempt to solve them by an exercise of legislative power would be a plain usurpation of the judicial function.

It is admitted, however, that such a method would not accomplish the purposes the Nebraska legislature had in view; not because it would not be effective to punish any *real* case of extortion, but because *that* is not what this legislature was *aiming at.*

Another method would be to do the precise thing, indubitably legal, which the Nebraska act *falsely pretends* to do—namely to fix *maximum* rates. This is a species of legislation very largely employed, and very beneficially, where it is adapted to the case. All *official* compensation, when paid by those for whom the service is rendered, is thus fixed, and multitudes of perfectly effective penal statutes exist making the slightest excess of charge a penal offence.

But the rates thus fixed must *be* maximum rates, and not merely *pretend* to be such. And what *are* true maximum rates for such a purpose? Upon this point there can be no dispute. They are *such* rates that if exceeded in any instance, the railroad or person who exacts an excess, however small,

may properly be subjected to a penalty. There is no injustice in this to railroads. No one can complain of being punished for doing wrong, unless, indeed, the punishment is so great as to outrage reason. We are now in the domain of the *police power*, and within that branch of it which consists of *criminal* law, and must, therefore, employ the definitions and rules of criminal law. A maximum rate therefore, which it may be made *criminal* to exceed, must be such a rate as we have just mentioned in the supposed case of a law simply punishing the exacting of an excessive charge, and not saying what a proper charge is, that is to say, a charge which *no man of ordinary sense could exceed without being conscious that he was doing wrong.*

It is not impossible to frame such rates. The Judge, or a jury, in the case supposed of a penal law against extortion simply, would, and should, where a case was presented of a charge which no reasonable man could exact without knowing that he was doing wrong, declare that the law had been violated. In such a case the decision would take away no man's right, would not deprive one of the full benefit of exercising his own judgment in respect to his business, and would not involve a determination of what a reasonable price was. *That* is a question which can arise only between the *parties to the transaction* in a suit instituted for the purpose of determining it; but whether a charge is or is not so palpably excessive as to make it unnecessary to find what *is* actually reasonable is quite another question, and one proper for legislative decision. The case is simply one

of an indisputable, conscious wrong. It involves no inquiry into what is reasonable or unreasonable in the matter of rates, but simply whether an act was done with a *guilty intent.* When a man is charged with a fraud, an inquiry into the ethical conditions which make it a fraud is irrelevant. The only question is whether the accused did the thing.

It will be at once said that such a law would be utterly ineffective and useless; but we answer that it would be perfectly effective to punish any *real and probable* case of *extortion*, and should it be inoperative, it would be for the reason that no *such* extortion exists. We at once agree that it would not answer any of the purposes of this Nebraska act; but this is for the plain reason that the sole purpose of that act was *to convert into the crime of extortion the ordinary, innocent and necessary acts of men in the transaction of their business.*

Fifth Point.—Having shown that the *law in question*, if defensible at all, can only be defended as an exercise of the *police* power to repress extortion, we are ready for a crucial proposition.

It is not an exercise of the police power at all, and therefore necessarily a nullity.

1. This is, in a sense, a negative proposition; but not the less decisive for that. A law in

order to be an exercise of the police power must exhibit the *characteristics* of that power. It must recognize the existence of a real mischief, and separate it from the innocent, useful and necessary acts of life, must not convert innocence into crime, and must employ remedies designed to reach only the recognized mischief.

This act exhibits no one of these characteristics.

a. There was no *occasion* for any such exercise of police power. There was no *mischief*. The undisputed fact is, and was notorious to the Legislature, that the railroad business in Nebraska had, under the intentional policy and law of the State, grown up and become what it was, when this legislation undertook to deal with it, under the force and pressure of *free competition*. The act assumes (on the hypothesis that it is an exercise of police power) that the business under that system had been charged throughout (for it deals with the whole system) with the criminal practice of extortion. This assumption is false, for it cannot be true. No such thing is possible under free competition.

b. It does not employ the *methods* of the police power.

The railroad service in Nebraska confessedly and notorously exhibits in different places every form of diversity in the nature of the service, its magnitude, cost and other circumstances affecting its value. No notice whatever is taken of these differences.

c. It is not pretended that the rates, if they may be deemed maximum anywhere, under the definition above given, are so everywhere. This subject will be further discussed hereafter, but is is pertinent to say now that the undisputed fact is that many roads, or parts of roads, hundreds of miles in length, cannot under the rates prescribed, and do not even under existing rates, earn *any* profit. The power assumed by the Legislature is to compel the operation of these roads at a loss, which it is supposed may be defrayed from other independent means of the operators at the peril of a forfeiture of charters. And this on the ground that rates not sufficient to maintain the roads are, nevertheless, *extortions*, and punishable as such! This, certainly, is not an exercise of *police power*. It is an attempt to effect some other object than those within the scope of that power.

d. It is not the exercise of the police power to regulate *monopolies*; for there *is* no monopoly, and none can be pretended; and if there were, the principles upon which monopolies may be prevented from exacting extortionate charges are in no respect different from those of any other exercise of that power for the same purpose.

Sixth Point.—We have shown that this legislature is *not* an exercise of the police power,

because it has none of the characteristics of that power. But its invalidity may be made to appear more distinctly by *affirmative* propositions showing what the act is aimed to accomplish and does accomplish ; and that it is *designed* to take away, and does immediately take away rights and property which the National Constitution declares shall not be taken away by any State.

We assert that this legislation is unconstitutional for the following reasons :

First.—It takes away the contract rights granted to, and vested in, the railroad companies by the *public contracts* under which they expended their capital in the construction of their roads.

Second.—It immediately takes away the *property* of those companies without compensation, and without due process of law.

Third.—It denies to them the equal protection of the laws.

I.—As to the first, namely, that it takes away *contract rights :*

1. No one can question that these roads other than the Union Pacific were built as an acceptance of a *public offer*. The rights of the Union Pacific were gained, however, in a way precisely similar, that is, by *contract*, in accepting an act of Congress, and performing

the consideration expressed in it to be performed by that company.

2. Nor can there be any question concerning the essential nature of the *right* acquired by these contracts. It was *to transact the business of a common carrier on and with the roads when constructed, as that business was ordinarily carried on.* Nor can there be any question as to what that business was. It was the assumption and execution of an obligation to carry goods *for all* who demanded the service for a *reasonable price*, to be determined, in case of dispute, by an appeal to the judicial power, which was to decide what was reasonable as between those parties.

3. That this right is taken away is too clear for argument. The obligation to carry the goods remains ; but the right to a *reasonable* compensation, to be determined by an unrestricted appeal to the Courts, upon evidence properly bearing upon the question, is utterly abrogated.

4. It may be said that this is not quite true, that there are still cases in which the question of reasonable compensation may be determined in the Courts in a suit between shipper and carrier. Yes, there is ; and in one case only, namely, where the *shipper* declines to pay even the statutory rate, and

yet chooses to *exact* the service. *He* can appeal to the Courts. But we are not asserting that any of the shipper's rights are taken away. They are indeed most sedulously preserved. He is not required to ship any goods, even at the statutory rate.

The right of the carrier acquired by his contract with the State was to a reasonable compensation determinable in a case of dispute by a Court upon evidence properly bearing upon that question. That right is immediately taken away the moment the carrier's claim transcends the sum fixed by the statute.

If anyone cares to argue that the carrier's right is, on this statement not taken away in *whole*, but only in *part*, we shall not follow in that discussion. The notion that our constitutional safeguards were designed only to prevent total robbery, and were inapplicable and inoperative in cases where *anything* was left by the plunderer, does not belong to jurisprudence. If such is the character of those safeguards they are not worth talking about, for they are not worth preserving.

5. It may be urged here that the *business* of a common carrier is subject to regulation by the State, and that, therefore, the right to carry it on becomes subject to regulation. We do not question the right of the State to *regulate* the business. We are insisting only that the *right to carry it on*, subject to such regulation, but for a reasonable compensation ascertainable as above mentioned, is vested in the railroad companies by *contract*, and

that that contract cannot be impaired by taking away the right which it bestows.

The State may prescribe the kind of track; require suitable equipment; require convenient stopping-places, depots; prescribe rules for the selection of suitable employees, and a possible multitude of other things; and require the companies to pay the necessary expense, but leaving the companies to such *chance* for reimbursing themselves as the stress of fair competition, to which the *contract subjects* them may afford. If they can comply with the regulations and operate the roads, very well; if they cannot, they must submit under the terms of the contract to a forfeiture of the rights granted.

But these severe burdens which the State puts upon its grantees require great expenditures. They all affect the question *what price* they may reasonably charge for the services. The State cannot, surely, both impose the requirements and take away or limit the power of satisfying them. The contract gave the grantees something as a *right*, and that something was the *chance*—nothing more—that by carrying goods at *reasonable* rates—such rates as a Court would declare *reasonable* in a contest between shipper and carrier—and under the exigencies of free competition, they could make a living, or an ample profit.

6. The last argument that may be urged is that the laws under which the contracts or grants were made *reserved* the right of *alteration*, *amendment* and *repeal*, and that under this

reservation the rights of the railroads are, after all, simply precarious, and the State may at any time take them away, whatever the injustice may be.

The original suggestion by Mr. Justice Story of this device, by which the difficulties encountered in the Dartmouth College case might be avoided, was infelicitous. It was a suggestion designed not to *solve* the actual difficulties presented by the problems of human transactions, but to relieve the judicial tribunals from the performance of their duty in solving them. Of course, it would be easy for a Court to rid itself of the task of enforcing the law which guards the obligation of contracts if it could promptly say that no contract was made ; or, what is the same thing, that the contract reserved to one party the right to annul it at pleasure. Very few difficulties are actually removed by this contrivance. The work of *administering justice*—that is, of carrying out the real intentions of parties—still remains. For one party to exercise a nominal privilege of revoking his obligation, which at the time the contract was entered into it was perfectly well understood by both would not be exercised, and when the revoking party has gained from the other enormous advantages upon the belief of the latter, encouraged by the former, that he never would revoke it, is the grossest bad faith in morals and in law.

Such conduct would, as Chief Justice Marshall once observed, "be disreputable in private individuals," and if there were a constant practice among men to make such reservations in their contracts, obviously without the purpose of acting upon them,

and which were never in fact resorted to, Courts would find no difficulty in declaring that they meant simply nothing. Whenever the purposes of a government require it to obtain the services or the property of its citizens, it has no means of obtaining them, at least in governments such as ours, except through the instrumentality of *contract*, and the engagements under which it seeks to obtain them must be *treated* as contracts, or there is an end of good faith among men and of the possibility of maintaining government.

But we are not required to go into any fine reasoning on this point. This Court has declared that this reservation, whatever force it may have, is *subject to limitations*, and one plain one is that a right once granted and vested under a contract cannot by any exercise of this power be taken away. The right to carry on the business of a common carrier as it is ordinarily carried on is *the very thing* fully vested in a railroad company when it accepts the invitation of the State and builds a railroad.

Sinking Fund Cases, 99 U. S., 700, 719–721.

See also
U.O.R.R. v. Lake R.R. Co. v. Delaware; 114 U.S. 501
Fletcher v. Peck; 6 Cranch; 87. 135.
People v. O'Brien; 111 N.Y. 1

7. Nor can it make any difference whether the corporation building the road is one formed under the laws of the State where the road is situated, or elsewhere. The nature of the transaction is absolutely the same in either case.

8. It may be argued that we ourselves admit that *true maximum* rates may be fixed by the legislature, and yet that the same consequence above supposed to be fatal to this law would, or might arise under such rates, for the inquiry by Courts upon evidence as to the reasonableness of a charge in a suit between shipper and carrier would be similarly arrested the moment the maximum rate was reached. But this is not true. The very essence of a proper legislative *maximum* rate is that it is one which cannot be exceeded without that *conscious guilt* which involves criminality, and admits the interposition of that branch of the police power which embraces criminal law. It must therefore, necessarily be so high that the judicial inquiry between carrier and shipper as to what a reasonable compensation for the service is, can be freely carried on *underneath* it. If, in such an inquiry, the legislative maximum rate were passed, it would conclusively prove that the legislative maximum was not a true maximum rate for the purpose of preventing extortion, but an attempt to decide the *judicial* question what is reasonable.

Charges which simply suffice to give the carrier a reasonable compensation and which the shipper ought to pay stop at a certain point, and any excess above may be *unreasonable* in the sense that it is more than the shipper ought to pay; but it is by no means *extortionate*. What is reasonable and what is unreasonable may be separated by a mere *line;* but what is reasonable and what is *extortionate* cannot be separated by a *line*, but only by a broad tract of *space*. What is extortionate is certainly unreasonable;

but it by no means follows that everything which is unreasonable is extortionate.

9. That the taking away of a contract right by a law is an impairment of the obligation of a contract, and also equivalent to a taking of property without due process of law, will not now be questioned.

Sinking Fund Cases, 99 U. S., 700, 718, 719.

10. The *mere* taking of an excessive price can be treated and punished by statutory law as extortion when and when only the thing or service is *required* to be sold or rendered; and as in all such cases the price or compensation is necessarily fixed by independent law, such legislation may be enacted only when the price is so fixed.

a. The mere taking of an excessive price for oats, or wheat, cannot be treated as extortion because the owner is not obliged to sell, and may rightfully ask what price he pleases, however large.

Should he employ any *improper artifice* to obtain it, *that* indeed could be treated as extortion.

b. Official services are *required* to be rendered, and, therefore, the fee is fixed by the law creating and requiring the service; and as this is always a certain sum about which

there can be no doubt, the taking of *anything* above such sum may properly be treated as extortionate.

c. But the price of some services which the law requires is not fixed at a precise and definite sum, but at what is *reasonable.* The services of common carriers belong to this class, and therefore the taking of excessive sums may be treated as extortion; but, plainly, the police power in punishing *extortion* in such cases could, if it employed a system of maximum rates for the purpose, only do it by fixing them so high that the carrier could not take them without doing a conscious wrong. Otherwise, innocence would be converted into guilt and the *judicial* power of determining what is *reasonable* would be usurped by the legislature.

d. If rates were established by the legislature *pretending* to be maximum, but *really* lower than those fixed by law, namely, reasonable rates, the thing really done is not to punish existing extortion, but to put a new price upon the thing. All attempts to deny or conceal this, are mere sophistry. And the validity of the legislation must necessarily depend, not upon the legislative power to punish extortion, but to put a price upon the thing.

II.—As to the second ground upon which the law is invalid; namely, *that it immediately*

takes away the property of the companies without compensation and without due process of law.

1. It is necessary at this point to consider the manifest general scope and object of the act. The *motive* of it is obvious enough ; but we shall here impute no motive except that of doing the precise thing which the act necessarily does ; and shall endeavor to state no fact which is disputable.

The act is made to operate upon the existing system of railroad transportation, as it has grown up under the ordinary operation of free competition, under which the companies have labored to make all the profit they could, and with that view have made classifications of freight and schedules of charges, presenting a multitude of diversities which were compelled by the stress of competition. This system thus established is an indivisible whole for each company, and embraces business, some of which is confined to Nebraska, and the rest, and much the larger part, is outside, or interstate business. The act disregards these classifications and rates, frames a new and elaborate system of classification and imposes *uniform* rates which wholly ignore all diversities of cost. It is conceded that hundreds of miles of existing roads cannot now, under the rates existing at the time of the passage of the act, be operated, except at a loss, which loss is now sustained by paying it out of the profits on other business. Whether the com-

panies can continue under the prescribed rates to operate their roads as a *whole*, and make enough to pay the operating expenses and fixed charges, is, to say the least, a doubtful one. It is certain that many parts of the roads, some of them embracing whole companies, independent in form, cannot do so.

To put the matter shortly, the power assumed and exercised by the Legislature, is to determine, against the will of the companies, *how*, and for what price, *their business shall be done* in the most vital and essential particulars.

2. The first inquiry is, *what kind of a power* is thus asserted and exercised? The answer is manifest. It is a power of *ownership*, and nothing else. These are the very things which owners of property do in respect to such property, and the *right* to do them is what constitutes *ownership*. Whoever can *rightfully* do such things with property *is* the *owner* of it to all practical intents. The nominal owners, the stockholders, are the mere *custodians* of the property charged with the business of operating it, pursuant to the will of others, namely, the State, which is the *real owner*. They would be working merely for a salary dependent for its continuance and amount on whether they could make the business under this control yield a profit.

As soon as it became manifest that they could gain no salary—that is, when no income was realized beyond operating expenses

and fixed charges—they would leave the business and seek their livelihood elsewhere. They would, of course, if they could, take their invested capital with them to employ in new pursuits, but *that* they could not do. It is *irremovable.* They might try to carry off some salable equipment, if it were really separable. But this would produce a trifling sum only. The mortgage bondholders would not take the trouble and expense necessary to obtain the possession of the property through a foreclosure, for that would be simply to take the place of the previous gratuitous custodians. The necessary result would be a formal forfeiture to the State for *non user* of franchises already in substance *taken* by it, and thus full *possession* would be added to *ownership.*

3. If the State should enact a law, in relation to a boot and shoe factory, or a cotton mill, prescribing maximum rates of a similar character, no one would doubt that it would be promptly declared unconstitutional by the Courts; and for the reason that it was an assertion of those powers which no one but the *owners* of those establishments could exercise; in short, that they were powers of *ownership*, and were, therefore, tantamount to a taking of the property. Exercising the powers of *ownership* in reference to things, is all there is of property.

If, therefore, this Nebraska act can be sustained, it is because what is commonly called railroad property is not property at all, or,

if property, differs in the most essential particulars from other things to which that name is given.

4. Many persons who believe in a wide extension of the province of government, earnestly advise the taking of all railroads by the government with the view of having them operated by a public management. One principal object with them is to have the power of fixing rates. They, however, do not advise such taking except upon the condition of paying the owners the fair value.

But of what importance are such discussions if the legislatures have the power, not merely to fix maximum rates to prevent extortion, but really to fix reasonable rates binding as such upon carrier and shipper. What more could the State do, if it should acquire the legal title to the roads? If the State has power to make such a regulation, there is no other regulation which it could not enact and enforce. Why resort to a policy which would require payment of some thousands of millions, by way of compensation for property taken, when every object of that policy may be gained without the expenditure of a dollar? Turn it which way we may, *the exercise of a legislative power to establish reasonable rates displacing the jurisdiction of Courts to determine in any and every case what is recoverable as a reasonable compensation is the exercise of the most important power of ownership, and whoever exercises it has already taken the property.*

III.—As to the *third* reason for the invalidity of this act. *It denies to the railroads the equal protection of the laws.*

1. This position amounts to but little more than the assertion of the same reasons under a nominally distinct constitutional safeguard. The holders of all *other* property are entitled to, and receive, the protection of the laws of Nebraska against such legislation. If railroad property be property at all, the owners of it are entitled to the same protection.

2. And the same is true, treating the carrying on of railroad transportation as a *business.* All other citizens are protected in their free and common right to manage in their own way their ordinary pursuits of life, which are made free. Railroad business has from the first been made, and now is, thus *free. All* are invited to engage in it on the same terms. It is thus made one of the common and free pursuits of life, just as much as the manufacture of boots and shoes. True, it is subject to a certain measure of public regulation, which other pursuits are not; but, *subject to such regulation*, it is entirely free.

Seventh Point.—This whole controversy may be made to turn upon another single proposition, based substantially upon the same

grounds, but differing in form from those already asserted; namely, the rates established by the act not *maximum rates, such as the legislature had power to establish.*

1. All rates fixed by legislative power for the purpose either of preventing *extortion* by railroads, or for the purpose of compelling them to carry at lower rates than those actually fixed by the companies under the stress of free competition, must be in a certain sense *maximum* rates; that is, they must prohibit the carrier from exacting any excess above them. Whether they are *such* maximum rates as it is within the power of the legislature to establish depends upon what they *aim to accomplish*, which aim is to be gathered from their *manifest method and necessary effect*. There are *two classes* of maximum rates which a legislature *may* attempt to prescribe:

First.—The first *aims* only to prevent *extortion*, a thing which is in the nature of a penal offence, and properly punishable, as this act punishes, by inflicting penalties for disobedience. It is not the exercise of a governmental power to regulate common carriers, because they are engaged in a calling "affected with a public interest," for it can as well be exercised in respect to men engaged in any other calling of life. No man engaged in the boot and shoe business or in any other business, has a constitutional right to practice extortion in it. To be sure, it would be difficult (but by no means

impossible) to establish rates for shoe dealers, because the question of reasonable price does not arise between them and their customers. The law does not compel them, as it does in the case of common carriers, *to enter into relations with other men on the demand of the latter.* It permits them to ask what price they please, even an *unreasonable* one, and to decline the dealing unless it is paid. To exact as much as possible from the necessities of others is a common right Competition alone limits the price. If it were the policy of the law to require shoe makers, or other manufacturers to sell their wares on demand, it would, of course, require a reasonable price to be paid. But shoemakers *may* exact an excessive price by the practice of some *unfair artifice*, and this, of course, would be *extortion* and punishable as such. The receipt, indeed, of an excessive price might be *evidence* of extortion, but could not be made of itself a crime.

The necessary limitation of the power to establish rates for a carrier for the purpose now under notice, that is, to prevent extortion, is that the rates must be so high as to plainly permit him to charge a *reasonable* price, as that would be determined to be in a suit between him and the shipper; for that is his indubitable *right.* And inasmuch as that price is, in nearly every case—we might justly say in every case—fixed by the stress of competition, the maximum rates fixed by the law must leave *clear and manifest room for the play of the competitive forces beneath them;* otherwise, the possibility, or rather the certainty, is incurred of a determination

by the legislative power of the judicial question of reasonable price, which involves the violation of every constitutional safeguard.

Second.—The other class of possible maximum rates which a legislature may attempt is distinguished from the first by its *manifest aim.* That aim is not to prevent possible cases of extortion, but to *ascertain* (we mean to give full credit for an intention to exercise a supposed public right without doing injustice), rates which, if charged in all cases, would enable the railroads, with strict economy, to perform the whole transportation service of the State and make a reasonable profit and to confine them to those rates in every instance without regard to cost or reasonableness in particular cases, by treating every charge above them as a penal offense.

2. The *first* of these possible attempts, when confined within its necessary legal bounds above stated, is entirely within the legislative power. The *second* is utterly beyond it and involves the violation of every constitutional safeguard. It strips the carrier at once of his right to have the question of the reasonable value of the service which he is compelled to perform determined as a *judicial* question. In the case of the Nebraska rates for instance, it is indisputable that in a vast number of instances the rates permitted are such as will not suffice to cover cost and fixed charges; and the only answer to the

complaint of injustice is that the loss will be made up by more profitable business within or *without* the State; and yet the railroad carrier is not permitted to assert in any Court that for any particular service he reasonably deserves to receive any more.

3. The inquiry then is, to which of the above-mentioned two possible attempts by a legislature to establish maximum rates the Nebraska act belongs? It must be promptly answered that it belongs to the one secondly described. Indeed, there is no pretense to the contrary. The single circumstance that while railroad transportation exhibits every degree of diversity as to cost to the carrier and value to the shipper, and while it is confessed that the rates are not sufficient to even maintain the service over hundreds of miles of the roads, the rates are *made the same in all cases* would at once disprove such pretense were any made.

Eighth Point.—The Nebraska act is invalid and void within the principles now fully recognized by this Court for the reason that while on its face it pretends to regulate rates on Nebraska business alone it necessarily affects the business done in other States, and the rates of that business. Rates so regulated are, in very absolute sense, *unreasonable*.

1. We have heretofore shown that the Ne-

braska business is really a part of an *indivisible whole*. The Legislature of Nebraska, as has heretofore been conceded by those who support its legislation, treats as *irrelevant* the question whether the rates fixed by the act would suffice to carry on the traffic in Nebraska and return any profit to the stockholders. It is alleged (though by no means shown) that if all the business of the trunk lines, including that done wholly in other States, and interstate business is taken together, the roads may make *some* profit after paying the expenses of operation and fixed charges; and it is insisted that the State of Nebraska has the right in fixing rates for ~~*that*~~ business, to take into account the *whole earnings* of the great trunk lines which do it, and their whole expenses; and that if in this way it can be shown that the *whole* business could still be done with the rates for the Nebraska business fixed as they are by this act, and yet *some* return be secured to the stockholders (which, indeed, they do not, and cannot, show) the legislation is sufficiently defended; that is to say, that the State of Nebraska has the right to make the transportation in other States, and interstate transportation *pay tribute to the people of Nebraska*.

2. When we consider that if Nebraska has the power to do this, other States in which the roads run must have the same power, and that they will inevitably exercise it, the possibility, or rather the certainty, is pre-

sented of rival efforts of different States, by exerting compulson on railroad companies to exact tribute from each other.

3. This consideration seems of itself sufficient to condemn all such legislation as being simply an effort by a State to control business and property wholly outside of its territorial jurisdiction. If there be anything in any of the decisions of this Court intimating that this is not a conclusive objection to all legislation fixing rates for business done by a company having lines running through several States, it may still be urged with all its force ~~to~~ an act framed in the way and against with the purpose, in and with which this act was framed. The consideration is still entirely relevant, and ought to be conclusive upon the general question of reasonableness.

Reagan *vs.* The Mercantile Trust Co., 154 U. S., 413, 417.

Ninth Point.—The business of transportation by rail in Nebraska consists in the performance of innumerable distinct items of carriage service for an innumerable number of persons and under every diversity of circumstance affecting the question of reasonable price for the service. It is submitted that the legislature of that State cannot, in any single instance, impose a rate which would preclude the railroad from a recovery before a Court and jury of what the Court and jury might find to be the

reasonable value of that service. This act utterly denies that right.

1. It makes classifications of all possible freight, and assumes that the reasonable price for carrying all things classed together is the same; which it has no legal right to assume; or, that, if the reasonable price is not the same, and there is a loss in any instance, the loss will be made good by a corresponding increased profit in other instances, and this it has no right to take into consideration.

2. It may be argued that the companies themselves make classifications and fix rates in this very way. Certainly, they do. That is because they are the *owners* of their roads, and it is a business which calls for all the intelligence, capacity and skill which they can exhibit. This is the very thing in which the control and management of a road are exhibited. They do this because it is what every owner of such property is privileged to do, and must do, in order that he may make his living. But what follows from this? Simply that the legislature of Nebraska has seized upon the rights and privileges of ownership, and stripped the real owner of them.

   What railroad can possibly live if its owners are deprived of the right of exercising their own sagacity and skill in its management, and compelled to submit to the management of others, and those others, those whose interests are directly opposed to theirs?

Tenth Point.—No one can deny, in view of the uniform decisions of this Court, and especially in view of the last one on this subject, that the power of a State Legislature to establish rates is *not unlimited*, but is subject to *some* sort of review in the Courts. Upon any view of the province of the Courts this act is invalid.

1. If we assume that is the province of the Courts to see whether contracts have been impaired, then the act is invalid.

2. If it is to inquire whether property has been taken without due process of law, then the act is invalid, for it exercises the most important acts of *ownership*, and compels the owners of enormous properties to surrender them to the State or operate them at a loss.

3. If we concede that the Legislature has power to do the very *sort* of thing which it has done, and can only be restrained by the Courts from carrying such action *too far*—an unsatisfactory doctrine which confesses that constitutional law is not susceptible of scientific treatment—then the act is invalid; for, upon the proofs in this case, the roads cannot be operated at the prescribed rates, but will be driven into bankruptcy.

This is the only point in the argument of this brief which involves disputed questions. For proof of the fact asserted reliance is had

upon the detailed argument of Mr. Woolworth on the questions of fact, and the conclusions of the Courts below. They fully make out a case of the same description as that in Reagan *vs.* The Farmers' Loan and Trust Co. (154 U. S., 362), and call for a like decision.

Eleventh Point.—The present condition of the decisions of this Court upon the question of the authority of a legislature to establish maximum rates, leaves open for discussion, to say the least, every proposition advanced in this brief. No *judgment* of this Court is opposed to any of them; and the manifest *tendency* of the later decisions is to support them all.

1. Wherever the naked question of the *power* of the legislature to prescribe maximum rates for railroads has been presented, the judgment has sustained that power, and we do not draw it in question here. The *utility* of an exercise of that power—a subject about which legislators may differ—is not a *judicial* question.

   But whenever the question has been presented whether a *particular attempted exercise* of that power is a valid constitutional enactment this Court has considered it, and in some instances upheld, and in others condemned, the legislation.

2. At the same time it would not be candid to say that the language of the prevailing opinions, or all the reasonings upon which they were based, ~~has~~ have been at all times consistent. This could hardly be expected in the case of questions so essentially novel, arising out of social and business conditions so different from any which had engaged the previous attention of Courts, and so pregnant with difficulty. In the law, as in every other science, the progress towards final truth is slow and tentative, and the true pathway is sometimes, for the moment, lost, and a partial retracing of steps is found necessary.

3. In the pioneer case (Munn *vs.* Illinois, 94 U. S., 113), after the question whether the *elevator* business was similar in its character, and to be governed by rules similar to those which control business "affected with a public interest" had been determined in the affirmative, the further question arose whether a State Legislature had the *power* to prescribe rates for that business. The decision affirmed the *existence* of such a power, but its nature and extent were not involved.

The cases of the C. B. & Q. R. R. Co. *vs.* Iowa (94 U. S., 155); Peck *vs.* the Chicago & N. W. R. Co. (*Ib.*, 164), and other cases decided at the same time, raised the same question in respect to *railroads*, and required the same decision. In neither of them were the questions of the extent of the power, or of the principles which should guide its exercise before the Court.

4. But at the same time it must be said that the opinion of Mr. Chief Justice Waite, which was also the opinion of the Court, in Munn *vs.* Illinois, practically affirmed that this power was absolutely unlimited by any constitutional restrictions. It declared in unequivocal terms that when any individual or corporation engaged in any so-called *public* employment, the matter of the compensation which they might charge was absolutely within the control of the Legislature; that the power of the Courts to determine what was reasonable compensation was one to be exercised only in the case of absence of legislative determination; and that the rule of reasonable compensation was a rule only of the common law, which could be changed at the pleasure of the Legislature. It admitted that this legislative power was liable to abuse, but declared that "for protection against abuses by legislatures, the people must resort to the polls, not to the Courts." These momentous conclusions (none of them necessary to the judgment) were founded upon the proposition that in the law of England, which we inherited, these public employments were subject to *legislative regulation*, and that such power of regulation included an absolute control over the whole matter of compensation for the services rendered in them; that this law was established in this country prior to our constitution, and that no part of it was designed to be surrendered by the acceptance of that constitution.

The conclusion from this proposition was necessary and inevitable that as against state legislation, or national legislation, prescribing

maximum railroad rates, the safeguards of our constitution could in no case be invoked, and that such legislative power was as absolute as that of the British Parliament. Consequently, if a railroad company should attempt to question legislative action upon the subject of rates by saying that it took away a contract right secured to railroads by their charters, in violation of the constition, the ready answer would be that the charters were taken *subject to the exercise* of this legislative power. And if the claim were that the legislation was invalid because its effect was to take property without due process of law, the answer would be equally ready that the constitutional safeguard thus invoked was not *intended* to limit the legislative power to regulate public employments which had been immemorially exercised in English law prior to the constitution.

5. It seems impossible to deny that this reasoning at once destroys the whole fabric of our constitutional safeguards for the protection of life, liberty and property. If the powers commonly exercised by the British Parliament in respect to the pursuits and businesses of men are still possessed by American legislatures, notwithstanding our constitutional limitations, the prices of all commodities may lawfully be prescribed by them, for Parliament undoubtedly possessed, and frequently exercised, the power to fix the prices of provisions, as well as of services in public employments.

This reasoning, had it been invoked in the

Dartmouth College case would have been conclusive to sustain the legislation which was there condemned; for what limit has the power of the British Parliament ever observed in dealing with corporations like the one in question in that case?

6. The utterly demoralizing effect of this error has become painfully manifest already, and will become increasingly so. In England, without written constitutional safeguards, the defense of fundamental rights is left to Parliament, and that body consequently feels the full responsibility of the trust, and its abstention from any invasion of them has become a tradition which operates as an effectual safeguard. But in this country that defense is entrusted to the higher courts, and the consequence is that legislatures do not feel the sense of responsibility. They pass laws and say that whether they are constitutional or not is no concern of theirs, that if any one claims that constitutional rights are invaded, they must assert their claim before the judicial tribunals, and the sad spectacle is coming to be witnessed, of legislators, both in the States and in Congress, deliberately contriving, not how they may keep within the just boundaries of legislative power, but how they may pass measures which they know are really beyond those boundaries, by *so framing them* as to avoid and evade judicial condemnation.

7. The decision in Munn vs. Illinois and the

associated cases purported to place the legislative power to establish maximum rates upon the *police* power to *prevent extortion;* and had it stopped there, no harm would have been done. The case of the plaintiff really denied the power of the legislature to do this. The *character* of the maximum rates in question was not challenged. But the vice of the opinion was that it confounded the power of establishing maximum rates with a view to prevent extortion, with the power of limiting and fixing the rates which might be charged *without reference to extortion.* It asserted the power of the legislature to oust the courts of their jurisdiction to determine what a *reasonable* compensation was.

8. This practical annihilation of our constitutional safeguards could not permanently stand; and the subsequent decisions of this Court have utterly repudiated the reasoning upon which it was based. They have fully reasserted the necessary function of our constitution, and have denied that public employments are any less entitled to its protection than any of the other pursuits of men. They declare that the property of railroads may be taken away by laws purporting to establish maximum rates, and that in the same way they may be denied that equal protection of the laws to which they are entitled.

unlawfully

Reagan *vs.* Farmers' Loan and Trust Co., 154 U. S., 362.

St. L. & San Francisco Railway Co. *vs.* Gill, 156 *Ib.*, 649.

9. But what remains to be decided is what the *principles* are by which we are to be guided in determining whether any *particular law* establishing rates is in violation of the constitution; *what it is* that may render such an attempt invalid; and whether there is any other way than the utterly unsatisfactory one of computing at vast and almost impossible labor what the gross receipts of a road and its expenses of operation and fixed charges are, with a view to learn from a comparison of these whether the proposed rates will leave anything to go to the stockholders. And even then the questions remain—utterly unfit for judicial determination—whether the stockholders ought to receive anything, or whether the road is not one so unfortunate in its location, or constructed with such extravagance that its stockholders ought not to reasonably expect to derive any profit from it.

This mode of determination leaves room for the mortifying conclusion that while our constitution will afford its protection in a case where a statute deprives them of *all* their property, it is powerless to intervene where the robbery is not complete.

It is respectfully submitted that legislation of this character, if unconstitutional, is so by reason of something which *it attempts to do*. If it attempts to violate a *right*, it must be invalid whether the damage which flows from it be much or little: and if it does *not* attempt to violate any *right*, the amount of private loss which it may cause is immaterial.

10. These suggestions have not escaped the attention of the Court, and the recent decisions invite the argument which this brief feebly attempts to make. They fully intimate that the following points are open for consideration:

a. The nature and extent of the *contract rights* of railroad companies. The opinion of the Court in Reagan *vs.* The Farmers' Loan & Trust Co. (p. 392) declares "The charter which created it (the railroad company) is a contract whose obligations neither party can repudiate without the consent of the other. * * * * If the charter had in terms granted to the corporation power to charge and collect a definite sum per mile for the transportation of persons or of property, it would not be doubted that that express stipulation formed a part of the obligation of the state which it could not repudiate. Whether in the absence of a stipulation of that character, there is not implied in the grant of the right to construct and operate the grant of a right to charge and collect such tolls as will enable the company to successfully operate the road and return some profit to those who have invested their money in the construction, is a question not as yet determined."

b. If the legislature has power to determine what *is* a reasonable compensation for a carrier, it would be extremely difficult to find a power in the Courts to re-

view that decision. And yet, while some of the cases seem to assert or to imply that the legislature has such power, the right of the Courts to review an exercise of it is vigorously and unanimously asserted.

Some reconciliation must be found for this apparent inconsistency; and the question what the precise provinces of the legislature and the Courts respectively are is an open question. (St. L. & San Francisco Railway *vs.* Gill; 156 U. S., 649, 659).

In the view maintained in this brief what is a *reasonable* compensation is a matter for judicial determination alone and in particular cases. What is *unreasonable*, using that word, not as indicating any mere excess, however slight, over what is reasonable, but in the only sense in which a legislature has any concern with the matter of compensation for services, that is, as *extortionate*, the legislature can determine. *Reasonable* and *unreasonable* in these senses are not separated by a *line* but by a broad tract of space.

c. When the Court exercises, as it now does, a right of review of the rates established by legislative act to determine whether they are *reasonable* (we suppose this must mean reasonable for the proper object of legislation), the various considerations which may have a just bearing upon that point remain to be determined; and, in particular, what force should be allowed to the circumstance that part of the busi-

ness of the road whose rates are prescribed consists of traffic wholly outside of the State, or partly within and partly without the State.

Reagan *vs.* The Mercantile Trust Co., 154 U. S., 413, 417.

Twelfth Point.—When the above questions are properly settled, our law in respect to maximum rates for railroad and other services will be brought into a more consistent form, which will at once secure individual rights and not unduly limit legislative powers; and then the following propositions, which this brief endeavors to support, will be found to be just:

I.—That one of the proper functions of the police power is to prevent *extortion* of excessive prices or compensation under color of right.

II.—That this power *may* be exercised in all cases where services are by law *compulsory;* and where, consequently, the charge is fixed, independently, by law.

III.—That the *appropriate* cases for such legislation are where the compensation is fixed at a *definite and precise sum*, as in the case of *official fees*, or rates for services rendered in the exercise of *public franchises*, where such

rates are fixed, or provision made for establishing them, in the grants of such franchises.

In such cases the taking of *any excess* over the established rate may properly be dealt with as being extortionate.

IV.—The case of common carriers, whether railroad or other, falls under the category of instances in which extortion may be punished, because the service is required and the charge fixed independently by law. But inasmuch as it is not fixed at a definite and *precise* sum, but only at what is *reasonable*, the taking *any* excess over the reasonable sum is *not* necessarily extortion, but that offence is committed only by the taking of a sum so palpably and grossly excessive, as to amount to conscious guilt. Therefore, any law seeking to repress extortion here by prescribing *maximum* rates, must make them high enough to give free play beneath them to all the considerations which properly bear upon the question of what a reasonable compensation is. Otherwise the law departs from its true function and undertakes to determine what a *reasonable* compensation *is*—a thing which it cannot do without immediately ousting the judicial power of one of its exclusive functions.

V.—It may be difficult to establish such maximum rates, and they might be useless after they were established; but that does not justify the invasion by the legislature of the judicial power or the destruction of constitutional safeguards. It proves only that where the price of

transportation is as subject to the laws of free competition as those in any other occupation or employment, there is no more need of statutes against extortion than in such other occupations; and also proves that when a legislature attempts to make rates of the character exhibited by the law in question, the real object is, not to *punish* extortion, but to *commit* it.

VI.—The real inquiry, therefore, in any case of maximum rates prescribed by a legislature is, what is their *manifest character?* Are they, on the one hand, an attempt simply to prevent extortion, or, on the other, to prescribe what *is* a reasonable compensation? If they are the former, they are a valid and just exercise of legislative power. If the latter, they are a plain usurpation of judicial power.

Thirteenth Point.—But without solving any of the questions above asserted as *open*, and upon the law as now established, the Nebraska act is unconstitutional and invalid for the reason that the rates are so low as to leave no real compensation to the railroads, and amount, therefore, to a taking of property without due process of law, and to a denial to the railroads of the equal protection of the laws.

Lastly.—The decrees of the Court below should be affirmed with costs.

JAMES C. CARTER,
Of Counsel for Appellees.

Supreme Court of the United States.

Arthur S. Churchill et al., *Appellants*,
v.
Oliver W. Ames et al.

Arthur S. Churchill et al., *Appellants*,
v.
George Smith et al.

Arthur S. Churchill et al., *Appellants*,
v.
Henry L. Higginson et al.

Mr. Woolworth's Brief for Appellees.

These are appeals against decrees of the Circuit Court for the District of Nebraska. They were bills, three in number, filed in that Court by stockholders of the Union Pacific Railway Company, the Chicago Burlington & Quincy Railroad Company, and the Chicago & Northwestern Railway Company respectively. The members of the Board of Transportation in their character as such were defendants in all of them; and in the first, brought by stockholders of the Union Pacific Railway Company, that and three subsidiary Companies were impleaded; in the second, brought by stockholders of the Chicago Burlington & Quincy Railroad Company, it was impleaded; and in the third, brought by stockholders of the Chicago &

Northwestern Railway Company, that and two subsidiary Companies were impleaded. The complaint is that on the 12th of April 1893 the Legislature of the State of Nebraska passed an Act called in these records House Roll No. 33, and entitled "An act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this act." The bills set out several grounds of objection to the validity of the act. They pray decrees declaring the act unconstitutional, and for injunctions restraining the Companies from observing or conforming to the provisions, commands, injunctions and prohibitions of the act, and the Board of Transportation from taking any proceedings to enforce it.

The cases were heard together on pleadings and proofs by Mr. Justice Brewer sitting at the Circuit. On the 12th of November 1894 his honor filed his opinion in the Clerk's office, holding against several of the contentions of the plaintiffs, but sustaining others, particularly such as are supposed to depend on provisions of the Constitution of the United States. On the 15th of the same month decrees were entered granting the relief prayed in the bills, on the ground that the act was repugnant to the Constitution of the United States, because it did not permit the Companies to exact for the transportation of freight from one point to another within the State, charges which

yielded a reasonable compensation for such services. The case is reported in 47 Fed. R. 15.

From these decrees the Board of Transportation appeals to this Court.

FIRST POINT.

House Roll 33 is unconstitutional because it attempts to fix and limit the rate which the Union Pacific Railway Company may charge for transportation of freight on its lines between points within the State. That Company is within the language of the act and the Board of Transportation so construes it. (Answer, par. VI.)

The Union Pacific Railroad Company was incorporated by an Act of Congress passed in 1862. (12 St. 489.) An Act amendatory of the charter was passed in 1864. (13 St. 356.) This Act authorized any or all of the Companies mentioned therein to consolidate their organizations. (Sec. 16.) Under this authority the Union Pacific Railroad Company, the Kansas Pacific Railway Company (at one time known as the Leavenworth Pawnee & Western and afterwards as the Union Pacific Railroad Company Eastern Division) and the Denver Pacific Railway and Telegraph Company became consolidated under the name and style of the Union Pacific Railway Company.

These acts establish the whole frame and structure of the Company. It constitutes the stockholders the

body politic and corporate, and vests in them plenary power to lay out the whole scheme of administration. It provides for directors, some to be elected by the stockholders and others appointed by the President of the United States, and defines their duties; for the election of the principal officers of the Company and the appointment of inferior officers; and for the annual meetings of the stockholders. In these and other like respects the charter does not differ from similar acts.

The original act authorized and required the construction of several roads: one a main trunk beginning at a point to be fixed by the President of the United States within narrow limits and running west to a junction with the Central Pacific Railroad, to be built from California east, (Sec. 8); another, a branch from the Missouri River at the mouth of the Kansas to the aforesaid initial point of the trunk, (Sec. 9); a third, from a point on the western boundary of Iowa, to be fixed by the President; and a fourth from Sioux City. (Sec. 14.) The routes of all these roads were to be approved by the President and determined by him. So, too, he was to fix the point of their connection and the width of their tracks. And the grades and curves were also prescribed. Subsequent acts were more specific in defining the construction of the roads and their character.

The object of the incorporation of the Company is stated in the original act to be "to secure the safe and speedy transportation of the mails, troops, munitions of

war and public stores," (Sec. 3,) and "to promote the public interests and welfare by the construction of said railroad and telegraph, and keeping the same in working order and to secure to the Government at all times, but particularly in time of war, the use and benefit of the same for postal, military and other purposes." (Sec. 18.)

The service which the Company was required to render to the Government was to "at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies and public stores upon said railroad for the Government whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all purposes aforesaid at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service." (Sec. 6.)

The act granted the right of way through the public lands, power to take from lands adjacent to the lines earth, stone, timber and other material for the construction of the road (Sec. 2), every alternate odd-numbered section on each side of the road to the extent of five alternate sections per mile (Sec. 3), which in the act of 1864 was increased to ten sections (Sec. 6), and Government bonds each for $1,000 to the amount of sixteen per mile, which were made a lien on all the Company's property. The Company was required to pay these bonds at their maturity. (Sec. 6.)

Twenty-five per centum of them was to remain in the Treasury undelivered, until the road and all parts thereof were finally completed; and if it were not completed within the time limited the bonds so reserved were to be forfeited. (Sec. 17.) Upon refusal to redeem the bonds or any of them "when required to do so by the Secretary of the Treasury, the road and all the rights, functions, immunities and appurtenances thereunto belonging and all lands granted to the Company" remaining in its ownership, were to be taken possession of by him for the use and benefit of the United States. (Sec. 5.) Compensation for services rendered by the Company to the Government was to be applied to the payment of bonds and interest until the whole amount should be fully paid; and until the bonds and interest were paid, at least five per centum of the net earnings of said road should also be applied thereto. (Sec. 6.)

Congress also reserved to itself the power to reduce rates of fare if unreasonable in amount, and fix and establish them when the net earnings of the entire road exclusive of the five per cent to be paid to the United States should exceed ten per centum of its cost. (Sec. 18.) And the better to accomplish the object of the act it reserved to itself the right to add to, alter, amend or repeal the Act. (Sec. 18.)

The construction of the road within a limited time, its maintenance and operation, were rigorously enforced by forfeitures as follows: "In case said Com-

pany * * * fail to comply with the terms and conditions of this act, by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same for an unreasonable time to remain unfinished or out of repair and unfit for use, Congress may pass any act to ensure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States to repay all such expenditures caused by the default and neglect of such Company or Companies: Provided, That if said roads are not completed so as to form a continuous line of railroad ready for use from the Missouri River to the navigable waters of the Sacramento River in California by the first day of July eighteen hundred and seventy-six, the whole of all of said railroads before mentioned and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling-stock, machine-shops, lands, tenements and hereditaments and property of every kind and character shall be forfeited to and be taken possession of by the United States." (Sec. 17.) The Company was also required to build a branch from a point on the western boundary of Iowa to be fixed by the President to the initial point of the main trunk on the 100th Meridian. And it was provided that in case of failure upon the part of said Company to make said connection

in the time aforesaid and to perform the obligations imposed upon it and operate the road in the same manner as the main line was required to be operated, it should forfeit to the Government of the United States all its rights, privileges and franchises. A like forfeiture was denounced in case the Company failed to build another branch from Sioux City. (Sec. 14.)

In order further to secure the construction, maintenance and operation of the road and the interests of the Government in the property, Congress has passed a long series of acts of most stringent character. On the 10th of April, 1869, a series of joint resolutions to that end were passed, (16 St. 56,) in which among other things it was required that the President withhold from the Company an amount of subsidy bonds sufficient to secure the full completion of the road, or in lieu thereof receive as such security an equal amount of the first-mortgage bonds of the Company; and the Attorney General was directed to institute proceedings to compel the giving of such security. (Sec. 3.) The Attorney General was also directed to inquire whether the charter and the franchises of the Company had not been forfeited, and whether illegal dividends had not been made to the stockholders, and to take and institute necessary proceedings for the recovery of the same. In the appropriation act of June 30th, 1874, (17 St. 485,) the Secretary of the Treasury was directed to withhold all payments for freight transported by the Company for the Government,

(Sec. 2); and the Attorney General was directed to institute a suit in equity in the name of the United States against the Company and others to recover its assets illegally dispensed; and jurisdiction was conferred upon the Circuit Court to hear and determine all cases of mandamus to compel the Company to operate its road as required by law. (Sec. 14.) The Thurman Act (20 St. 56) contains many particular provisions designed to secure the Government against the Company's defaults, directs the Attorney General to enforce its rights by appropriate judicial process, and provides for the forfeiture of all its rights, privileges and franchises if it fail to perform its duties within six months. The Telegraph Act of 1888, which has recently been the subject of inquiry here, requires the Company to operate its telegraph line as required by the charter and directs suits to compel the performance of this duty. Several other acts of the same general character have been passed from time to time by Congress. They all form a body of legislation asserting the rights of the Government over the Company, its property and operations and providing various stringent remedies for their enforcement.

The declared objects of the acts, their explicit directions for the construction of the roads, the services to be rendered, the powers reserved over the properties, and various other provisions, impress upon the Union Pacific Company the character of an agency of the Government in its most vital parts.

I. It is too late in the day to take a moment's time to prove that the States cannot interfere with any of the operations of the General Government. And in administering its affairs that Government may act directly by its own officers or it may make use of any appropriate agency. In proper cases Congress may create a corporation to render certain services to the Government. At one time it created a bank to be the fiscal agent of the Government, and this Court held that such a corporation was a proper means to effect its legitimate objects.

McCullough v. The State of Maryland, 4 Whea. 316.

Osborn v. The United States Bank, 9 Whea. 738.

And such an instrumentality, when once adopted by Congress for such purposes, is in its operations as far beyond any interference by a State as the Army or Navy or the Post Office. Attempts were made by two several States to tax the operations of the Bank but this Court held such attempts futile. In the Pacific Railroad acts of 1862 and 1864 Congress granted to the Central Pacific Company some of the franchises which we have seen it granted to the Union Pacific Company, and the State of California attempted to tax them. This Court held that for the State to lay such a tax was "not only derogatory to the dignity of the Federal Government but was repugnant to its paramount sovereignty."

California v. The Pacific Railroad Company, 127 U. S. 1.

To be sure that was a case of taxation and this is one of regulation; but as Mr. Justice Miller said in Wabash Railroad Co. v. Illinois, 118 U. S. 557, 570, it is impossible to see any distinction between a statute which regulates the charges for transportation and a statute which levies a tax.

It is true that this Court has supported a tax upon the property of this Company.

Thomson v. Pacific Railroad, 9 Wall. 579.

Railroad v. Peniston, 18 Wall. 5.

These cases have not an unqualified authority. Eight judges heard the last case. Mr. Justice Strong delivered the opinion of the Court, and Justices Clifford, Miller and Davis concurred in it. Mr. Justice Bradley delivered a powerful dissent and Mr. Justice Field concurred with him. Mr. Justice Hunt dissented generally. Mr. Justice Swayne concurred in the judgment; but was of opinion that Congress could waive the exemption from taxation and had done so; but he held that the road was a national instrumentality of such a character that Congress could interpose and protect it from state taxation, whenever it deemed it proper to do so.

Even if the judgment has decisive authority, it does not qualify the doctrine of the two bank cases cited. Mr. Justice Strong was very careful to mark the distinction between those cases and that of the Railroad Company: the tax in the former being upon the operations of the Bank, and in the latter upon the prop-

erty of the Railroad. An act regulating railroad rates operates upon the franchises of the Company and is within the doctrine of the bank cases, and is not within that of the railroad cases.

We have been at pains to state with some particularity the provisions of the acts of Congress relating to this Company, and have drawn attention to its character, the objects for which Congress created it, the control over its affairs property and management which is reserved, and the interests of the Government therein, in order to point out very wide distinctions between the Union Pacific and the Texas & Pacific Companies, and in that way meet the contention that this case is ruled by Reagan v. The Mercantile Trust Company, 154 U. S. 413.

The Texas Company is on the same footing as the Union Pacific in these respects: it was incorporated by Congress, (16 St. 573); a grant of land was made to it; its road was declared a military and post road; and it was made "subject to the use of the United States for postal military and other governmental purposes, at fair and reasonable rates of compensation not to exceed the price paid by private parties for the same kind of service; and it was provided that the Government shall at all times have the preference in the use of the same for the purpose aforesaid." It may not be impertinent to say in passing that every congressional land grant to railroads has contained similar provisions.

These are all the provisions common to the charters of

the Texas and Union Pacific Companies. Besides them the acts relating to the latter contain provisions of great force, vigor, and stringency, by which it is devoted to the service of the Government. The case of the Texas Company may have been rightly ruled, but it is not decisive or applicable to the case at bar.

II. In the provisions of the acts which have been partially quoted, besides grants of lands, loans of government bonds ha been authorized. The acts impose upon the Cor ny the duty of reimbursing the Government these loans when required to do so by the Secretary of the Treasury, and apply five per centum of the net earnings and compensation for services rendered by the Company to the Government, to the payment of the bonds, and also made them a lien upon all the corporate property. Various subsequent acts fortify the rights and remedies of the Government. This Court having decided that the Company was not required by these acts to pay the interest on this debt until the principal became due, the debt was rapidly increasing, with the certain result of reaching an amount in excess of the value of the property, which would expose the Government to heavy loss. To anticipate this threatened mischief the Thurman Act was passed. Among other things, it provided that the Union Pacific Company should annually pay into a sinking fund, twenty-five per cent of its net earnings. Mr. Mink, the Comptroller of the Company, informs us that these sums amounted to a good deal

more than $1,000,000 annually for each year from 1889 to 1892, both inclusive, (p. 710); and that the whole debt to the United States is $52,948,663.91. (Page 709.)

This enormous debt is property of the United States. As such, it cannot be dealt with by the States in any manner nor to any degree; no more than money in the treasury, or property used in the postal service, or the operation of the mint, or the collection of the customs. It is no answer to say that the liability of the Government to loss is remote, or that the amount of loss may be inconsiderable. We know that such is not the case: the fact is that reductions of the revenues of the Company are just so much money taken from the treasury of the United States. But that is not the question. The right of the State cannot be admitted, whatever the effect of its exercise. Appropriating what was said by the Court in the bank cases, "if the right to reduce the earnings of the Company and impair the security of the Government exists, it is a right which in its nature acknowledges no limit. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it."

We submit that it is not within the powers of the State of Nebraska to interfere with the revenues or income, or the sources of the revenues or income of the Union Pacific Company, because that Company is a debtor of the United States to a large amount, and its

earnings are irrevocably pledged to the payment of its debts.

There is another consideration which conducts us to the same result.

We have seen that the object of Congress in granting the charter of the Company was to provide an instrumentality for the transportation of the mails, troops, and government stores, particularly in time of war; and that this service is exacted under severe penalties. This object cannot be realized and this service assured unless the road is kept in repair and efficient operation; and the Company is laid under forfeiture of all its property and franchises in case it fail in these duties. If the State can meddle with the Company's earnings, it may reduce them to such extent as to leave it without means to maintain and operate its road, and ready to render the service exacted of it; its efficiency as an agency of the Government may be so impaired that it cannot transport troops and munitions of war as promptly and safely as the exigencies of any moment may imperatively require.

We know that a State cannot tax bonds of the United States. (Weston v. the City Council of Charleston, 2 Pet. 449.) The reason assigned by the Court is, that such power in the hands of a State may disable the Government to borrow money, however urgent the exigency or imperative the demands of the moment. Nor can the State of Nebraska disable this

instrument of the Government to maintain its road in efficient operation, so as to be ready at all times to answer its call for the transportion of its mails, stores, troops and munitions of war.

If in the exercise of its legitimate powers the General Government should be free and unembarrassed by any conflicting claim on the part of the States; if the powers of a State cannot rightfully be exercised so as to impede and obstruct the free course of those measures which the Government may adopt; and if to that end the Government may make use of a corporation of its own creation as a suitable instrumentality, then this House Roll 33 is beyond the constitutional competency of the State, so far as it applies to this agency of the Government. The great and fundamental principle which we invoke has application here or the Government is powerless elsewhere to exercise its necessary and highest functions.

III. Section 18 of the Act of 1862 provides that "whenever it appears that the net earnings of the entire road and telegraph including" etc. "shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law." This provision withdraws from the State all power over rates to be charged by the Union Pacific Company.

It is said that the section applies only to fares of passengers and not to charges for freight. This contention rests on the single word "fare;" the clause is "Congress may reduce the rates of fare." It is too narrow a construction to confine this clause to passenger fares. Every word and clause in the provision and the whole reach and import of it is against such limitation. The power reserved to Congress to reduce the rates does not depend upon the passenger earnings, but upon earnings from the whole business. The words are "whenever it appears that the net earnings of the entire road and telegraph," etc., shall exceed ten per cent, etc., then the reserved power comes into operation. If the purpose were to reserve the power to reduce passenger rates only, the contingency upon which it depended would not be likely to be the earnings on all other business. So, too, the method prescribed in the section for ascertaining the net earnings contemplated other items than those connected with passenger service. Deductions are to be made for all expenditures, including repairs and the furnishing, running and managing of said road. There is a manifest incongruity in reserving the power to reduce the charges for carrying passengers, and making it dependent upon what may remain after deducting all expenses of all other classes of business.

While these considerations dispose us to adopt the larger meaning of the word "fare," there is another which is decisive.

This road was to be built from one of its termini to the other through an unpopulated region; a region a large part of which was incapable of being populated. That was a fact so well understood in 1862 that the enterprise was generally regarded as foolhardy. The passenger business was a very small matter; it was but a fraction of the service which was exacted of the Company. As is the case with all railroads, and especially those running through new and sparsely peopled regions, the main business and the main source of income and the great interest is the transportation of freight. It is very unreasonable to suppose that in this legislation, characterized by a prudence, wisdom and aptness of provisions unsurpassed and hardly ever equaled, the greater matter would have been overlooked, and the smaller matter have been so carefully attended to.

And we may look farther for an explanation of this clause. In section six of the act, the duty is laid on the Company of transporting the mails, troops and munitions of war, supplies and public stores, "for the Government at fair and reasonable rates of compensation, not to exceed the amounts paid to private parties for the same kind of service." The measure of compensation which the Company was entitled to for Government service was what private parties should pay for the same kind of service; that is to say, for transportation of freight. It was therefore a matter of moment to the Government that the freight rate

should be kept under control. This was done only in the clause under consideration; if it be not there it is not anywhere. It is not possible to resist the conviction that Congress intended to reserve a power over the rates of freight which was of very great importance to the Government. And this especially when it was making some reservation of that nature.

We submit that the very narrow meaning which the appellants place on the word "fare" is inconsistent with the other clauses of the section, and above all with the intention manifested in other provisions of the act and in its whole scope, import and purpose.

2. This objection being removed out of the way we may go on to the question whether, reserving to itself control over rates, Congress withheld all that matter from the State.

It is important in the first place to understand the exact status of the Railway Company with reference to the State. The Union Pacific Railroad Company was incorporated in 1862 with power to build a road from the Missouri River west to a junction with the roads to be built east from California. At that time Nebraska was a Territory and as such subject to the sovereignty of the United States. It was therefore competent for Congess in chartering the Company to reserve to itself control over the Company as extensive and particular as any State could do over a Railroad Company which it incorporated. Nor was the status of the Company in any wise changed or affected by

the transfer of the sovereignty from the United States to the State of Nebraska upon its admission into the Union. All the functions, capacities, rights and duties of the Company remain as they were originally defined and established. It is not a foreign corporation, as is a Company incorporated under the laws of one State and entering the territory of another to carry on its corporate operations therein. It is in the State by an authority paramount to it and independent of its control; at least so far as that control has been reserved in its Charter.

We submit, therefore, that Congress reserved to itself control over the rates to be charged by the Company for the transportation of freight as well as passengers. The reservation may have been subject to a remote contingency; but that was a matter for the discretion of Congress, doubtless wise at the time. That, however, does not qualify the purpose to insist upon the whole power of control over rates. That is as large as if the provision had been simply that Congress could fix them at its pleasure.

It need hardly be stated that the reservation to the United States of the power in any contingency and in any degree is incompatible with its exercise by the State. No man can serve two masters; and this Company cannot be subject at the same time to the United States and the State.

IV. We submit that it has been demonstrated that House Roll 33 is inoperative so far as the Union Pacific

Railway Company is concerned. But that is not the whole reach and effect of the proposition which has been established; nor is it the more interesting aspect of the case.

The provisions of House Roll 33 apply to all railroad corporations doing business within the State of Nebraska, and include the Union Pacific, the Chicago Burlington & Quincy, the Chicago & Northwestern, the Missouri Pacific, and the Elkhorn Companies. The federal corporation not being subject to the jurisdiction of the State in this respect, the result is that the act is unconstitutional and void, not only in respect of that Company but in its whole scope and reach. It was beyond the competency of the legislature to enact the law in the words of it and therefore it must fall. The contention may be shortly stated thus: the legislature said the provision of this act shall apply to all railroad companies doing business in this State. This was more than it had the power to say. It is of no consequence what it meant to say, or what it might have said; what it did say was an empty sound meaning nothing. Had it been content to say, this act shall apply to all railroad companies not chartered by Congress, it would have spoken within its competency and its words would have effect; but when it spoke in terms within whose circumscription are Companies chartered one by Congress and others by the legislatures of the States, the whole provision falls.

United States v. Reese, 92 U. S. 214, was an indictment against two inspectors of a municipal election in Kentucky, for refusing to receive and count at such election the vote of William Garner, a citizen of the United States of african descent. The Fifteenth Amendment to the Constitution of the United States prevents States from giving preference to one citizen of the United States over another on account of race, color or previous condition of servitude, and authorizes legislation by Congress to carry it into effect. Congress passed an act providing for the punishment of any person who shall by threats, etc., hinder, delay, etc., any citizen from voting at any election. The terms of the section were general; there were no words of limitation or reference confining its provision to unlawful discrimination on account of race etc. As the Statute went beyond the terms of the constitutional provision, it was of course void as to the excess, and the question was whether its general terms, which include proper matter of legislation, could be upheld to that extent. Mr. Chief Justice Waite, delivering the opinion of the Court said: "We are not able to reject a part of the Statute which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not; the proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there.

* * * "To limit this Statute in the manner now asked for would be to make a new law, not to enforce an old one; this is no part of our business."

The Trade Mark Cases, 100 U.S. 82, were indictments for counterfeiting the trade marks of G. H. Mumm & Co., of Rheims, France, manufacturers and sellers of champagne wine. The Act of Congress extended to trade marks used in both foreign and domestic commerce. It was contended that as the counterfeit was of a foreign trade mark and therefore within the Constitution of the United States, and as the Statute covered such cases as well as trade marks used in domestic commerce, the Statute should be supported as to the former although void as to the latter; and therefore the indictment could be sustained. Mr. Justice Miller speaking for the Court said: "It has been suggested that if Congress has power to regulate trade marks used in commerce with foreign nations and among the several States. these statutes shall be held valid in that class of cases, if no further. To this there are two objections.

First, * * *

Secondly, while it may be true that when one part of the statute is valid and constitutional, and another part is unconstitutional and void, the Court may enforce the valid part where they are distinctly separable, so that each can stand alone. it is not within the judicial province to give to the words used by Con-

gress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. * * * If we should in the case before us undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the right which parties would hold in some instances under the Act of Congress and in others under state law."

Baldwin v. Franks, 120 U. S. 678, was habeas corpus. The petitioner had been arrested by the Marshal for California upon the charge of conspiring with others to deprive certain subjects of the Emperor of China, of the equal protection of the laws and of equal privileges and immunities under the law. The indictment was under a statute of Congress, the terms of which were general, denouncing conspiracies to deprive any person of the equal protection of the laws. It was held unconstitutional, although Congress would have been competent to have enacted a statute against conspiracies against aliens.

The same doctrine was applied in the Virginia Coupon Cases, 114 U. S. 269, 305.

Applying the doctrine illustrated by these cases to House Roll 33, its general provisions applicable to all

railroads being unconstitutional as to the Union Pacific Railway Company, is void in its full reach and effect.

SECOND POINT.

House Roll 33 is unconstitutional because it unjustly discriminates against certain of the roads in the State in favor of another.

The first section of the act declares that "it shall apply to all Railroad Companies engaged in the transportation of freight within the State, and to all shipments of property from one point to another therein."

The third section prohibits each of the railroads within the State charging higher or greater rates than those fixed in the act. The fourth section exempts from its provisions all railroads or parts thereof built since January 1st, 1889, or which may thereafter be built before December 31st, 1899. It appears from the pleadings and proofs that the Chicago Rock Island & Pacific Railway Company is and for twenty years has been a corporation organized and existing under the laws of the States of Illinois and Iowa, and owns and operates a railroad from Chicago in the former State to Council Bluffs in the latter; that between the first of January, 1889, and the first of January, 1891, it acquired the right to run its trains over the Union Pacific Railway Company's bridge and tracks between Council Bluffs and South Omaha, and built a railroad

from South Omaha by way of Lincoln to Beatrice where it connects with another of its lines to Denver, and is operating its trains from Chicago by way of Council Bluffs, Omaha, Lincoln and Beatrice to Colorado points; that it is in close and active competition with the Union Pacific, Omaha & Republican Valley, Chicago Burlington & Quincy, and other Companies, and its line has many common points with the lines of those Companies; and that all these railroads serve the same communities, and seek from and do for them the same business, and have substantially equal facilities and ability to serve them. Under the operation of the act, the Rock Island is left to charge and receive compensatory rates for the same service which the other Companies render, while they are not permitted to do so.

It has been an elementary principle of the civil polity of this country from the earliest period in its history, that all citizens stand upon an equal footing before the law. Equality of rights, privileges and capacities among all the people so far as they are granted by law has been the rule. Special privileges are not to be granted to nor special burdens imposed upon some members of the community. The State has neither favors to bestow nor injuries to inflict upon any of its citizens. As was said by the Supreme Court of Massachusetts as early as 1814 in Holden v. James, 11 Mass. 396, 405. "It is manifestly contrary to the first principles of civil liberty and natural justice and to the

spirit of our Constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that any one should be subjected to losses, damages, suits, or actions from which all others under like circumstances are exempted." This principle of natural justice which forbids discrimination by the State in favor of some of its members against others has been applied in a great variety of cases. Thus in Bull v. Conroe, 13 Wis. 238, 244, it was held that the general laws exempting property from seizure and sale on execution could not be varied for particular places and localities. So, too, in Picquiet, Appellant, etc., 5 Pick. 65, it was held that a resolve of the Legislature empowering a judge of probate to take an administration bond, in a particular case and in a mode differing from that described by the general laws, was unconstitutional. The same was held in respect of an appeal from a decree of the Probate Court in Louis v. Webb, 3 Greenl. 326, and in respect of a review upon a suit between private citizens in Durham v. Louiston, 4 Ib. 140. Many other cases are collected by Cooley in his work on Constitutional Limitations, page 391, *et seq.* This general principle was not recognized by the Constitution of the United States until the adoption of the fourteenth amendment. At that time it was made a fundamental principle of Federal Jurisprudence to be administered and enforced by the Federal Courts. That amendment, together with the one which pre-

cedes and the one which follows it, forms a new Magna Charta, under which the rights of every citizen are inviolable; and if infringed in any degree, anywhere, by any power, will be vindicated by the august Sovereignty of the Nation. Heretofore the principle could be invoked only in the tribunals of the States; now it is made secure by Federal authority. (Santa Clara Railroad Tax Case, 9 Sawy. 165; 118 U. S. 394.)

In order to meet this objection it is pretended that the sections referred to, classify railroads in the State and that discrimination produced in that way is permissible. It is undoubtedly competent for the legislature when establishing maximum rates of charge for the transportation of freight and passengers to classify them and prescribe one rate for one class and another for another. But the discrimination effected by that device must be based upon some reasonable principle, not upon an arbitrary distinction having no relation to the earnings or service of the Company. A discrimination based on the length of the several lines, or the amount of business done by them, or other like differences, has been approved. (Chicago Burlington & Quincy Railroad Company v. Iowa, 94 U. S. 155, 163; Dow v. Beidelman, 125 U. S. 680.) But a discrimination having no relation to the earnings or service of the Company cannot be tolerated, any more than if certain rights are given to persons of one color, as whites in preference to blacks, or private individuals in preference to corporations, or members of one re-

ligious denomination in preference to those of another. If such distinctions are permissible the fourteenth amendment is a myth and a delusion. Some of these Companies are called *railways* and some *railroads*. Statutes granting to those called railways immunities which are denied to those called railroads on account of this difference in their style cannot be justified. Some roads are operated by an officer called a General Manager; others by an officer called a General Superintendent; an act giving to one privileges withheld from the other on account of this difference classifies the roads but will not justify a distinction between them.

The Constitutions of many States forbid the enactment of special laws relating to certain subjects. Special acts have often been passed, the validity of which has been assailed because within this constitutional inhibition. The attack has been met by the contention that the statutes classified the subjects mentioned in the provision, and in that way avoided the constitutional provision. The question was presented in several cases whether the classification was a proper one.

The State v. Hammer, 42 N. J. L. 435, involved the question of a statute entitled "An act relating to the assessment and revision of taxes in cities of this State;" it declared that it should apply to any city where a Board of Assessment and Revision of Taxes now exists. It appeared that there were but two

Cities within that description. It was argued in support of the act that all the group of objects having characteristics sufficiently marked to distinguish them as a class, answered the constitutional provision. Beasley, C. J., delivering the opinion of the Court, said: "The true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction having a reference to the subject-matter of the proposed legislation between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such in the nature of things as will in some reasonable degree at least, account for or justify the restrictions of the legislation." In the State v. the City of Trenton, 42 N. J. L. 486, the Statute provided that it should be lawful for any City within the State having a population of not less than 25,000 inhabitants, and a floating debt which the available funds of such City will not be sufficient to pay, could borrow the money to the amount of such indebtedness and issue bonds therefor. The Common Council of the City of Trenton passed an ordinance for the issue of bonds to fund its floating debt, by virtue of these provisions. A citizen and taxpayer sued out

a writ of certiorari to test the legality of the corporate proceedings, contending that the statute was special and local, and contravened the constitutional provisions above referred to. It was held in the first place, that the classification of towns was proper, and that an act relating to one class was not within the constitutional prohibition, but that such prohibition required that some limit should be placed upon its exercise, so as to exclude special and local legislation. Dixon, J., said on this subject: "Hitherto this limit has been declared to exist in the principle that the class to be affected must consist of individuals distinguished by some important characteristic to which the purpose of the law relates, and must embrace all those so characterized. * * * But any attempt to legislate for a group of cities not classified in harmony with this principle, is, as I understand, declared to be evasive and in violation of the fundamental law. (Rutgers v. New Brunswick, 42 N. J. L. 51; Skinner v. Collector, Ib. 407; State v. Parsons, 40 N. J. L. 1; State v. Herman, 75 Mo. 340; State v. Miller, 100 Mo. 439.)

The Constitution of Pennsylvania provided that no local or special bill should be passed, unless notice of the intention to apply therefor shall have been published, etc. In The Commonwealth v. Patton, 88 Pa. St. 258, the statute provided, in order to individualize a city and county, that in any counties with a population of 60,000 inhabitants, in which there was a city with a population exceeding 8,000, situated from the

county seat more than twenty-seven miles, a Court for civil and criminal business could be held for one week in every year. The Court characterized the provision as "classification run mad." In appeal of Ayars, 122 Pa. St. 266, it was said, "The underlying principle of all cases is that classification with the view of legislating for either class separately is essentially unconstitutional unless a necessity therefor exists. A necessity springing from manifest peculiarities, clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class separately that would be useless and detrimental to the other * * * Classification which is grounded in no necessity and has for its sole object an invasion of the Constitution, is quite a different thing."

The very recent case of the Pittsburgh Fort Wayne & Chicago Railway Co. v. Martin, County Treasurer, 41 N. W. Rep. 690, gives us the latest expression of the Supreme Court of the State of Ohio on this subject. The act in question related to "any City of the fourth grade of the second class, which at the federal census of 1890 had a population of not less than 5,750 and not more than 5,800, or which at any subsequent federal census shall have such population." The Court said of this act, "When an act is manifestly intended to, and does, in fact, at the time of its passage, apply to only one of a given class consisting of many, it is special," and therefore unconstitutional.

These cases illustrate the general principle that classification, if founded on pertinent and just distinction, is proper, but if founded on specious and illusive distinctions is vicious. If this principle avoid the statute which contravenes a constitutional provision against special legislation, how much more will it have that effect when the very highest rights of the citizen and fundamental principles of personal liberty are involved.

The distinction made in House Roll 33 between the Rock Island Company on the one side and the other Companies on the other, based simply upon the time of their construction, is arbitrary and not justified by any substantial difference. The fact that the Rock Island Company completed its road within a period of two years before the passage of the act, has no more to do with its earnings, or its ability to make earnings, or to serve the public, than the fact that it styles itself a railway instead of a railroad. It is impossible to resist the conviction that it was exempted from the severities of this act by those unreasonable prejudices and passions which seem to have dominated the legislature.

THIRD POINT.

What has been submitted shows that House Roll 33 is vicious in two particular provisions. There is a more general objection to the act. Its sole object was to

establish a schedule of rates, and to forbid the Companies charging higher rates than those fixed by the act. That is its whole scope and purpose. The objection is that these statutory rates, if put in force, would not yield to the carrier reasonable compensation for the service to be rendered by it. Several interesting questions present themselves in the course of the consideration of this objection. Before discussing them it will be useful to present the facts showing the nature of these statutory rates.

House Roll 33 was passed on the 12th of April, 1893. One method of testing the reasonableness of the rates fixed by it, is applying those rates to the business of the Companies for some years before that day. There is a manifest advantage in that process, for we know what rates were charged by the Companies in those previous years and how much they realized from their business. Nothing is left to conjecture so far. If the statutory rates are less than those charged by the Companies, and if from what they earned is deducted the reductions caused by the statutory rates, the result shows whether the latter would yield to the Companies a reasonable compensation or not.

This method of testing the reasonableness of statutory rates is subject to correction. It is possible that at or about the time the act was passed, or afterwards, circumstances and conditions have changed so that rates which were reasonable before have become unreasonable after the passage of the act; that is, un-

reasonably high or unreasonably low. Accordingly if the statutory rates were put in force after the act was passed, we are to inquire what the Companies earned and whether their earnings yielded a fair compensation for their services; or, if the statutory rates were not put in force and the Companies continued their former rates, we may deduct from what they earned the reductions proposed by the act. It will be easy to see whether those rates would have been reasonable. These two methods conduct to a satisfactory result.

One or two explanations must be made in order to a ready apprehension of some of the facts. One of these bills involves the earnings, expenses and rights of the Chicago, Burlington & Quincy Railroad Company. This Company owns about 2,200 miles of railroad in Nebraska, which it operates under the name of the Burlington & Missouri River Railroad. It does so because a Company of that style formerly owned these Nebraska lines, became consolidated with the Chicago Burlington & Quincy, and it was convenient for purposes of operation to retain the former name, although the style in law was that of the other Company. This explains why in the course of the testimony the Chicago, Burlington & Quincy Railroad Company is often spoken of as the Burlington & Missouri River Railroad.

Another of these bills involves the Union Pacific, the Omaha & Republican Valley and the Omaha & Kansas City Railway Companies. The Union Pacific

owns all the stock and bonds of the other Companies and operates them; they are subsidiary lines and branches of the Union Pacific, although for convenience operated in their own names.

The third bill involves the Chicago & Northwestern, the Fremont Elkhorn & Missouri Valley, and the Chicago St. Paul Minneapolis & Omaha Railway Companies. The two latter are subsidiary Companies of the former, and are operated by it in their own names, but under substantially a common management.

The information contained in this record upon the questions of rates, earnings, expenses and other related matters, comes from a few witnesses, of each of whom a word may be said.

One of them is Mr. Dilworth. He is one of the defendants and was impleaded because he is one of the Secretaries of the Board of Transportation. He is also one of the solicitors for the Board and as such has actively participated in these proceedings. He was repeatedly called by both sides and testified sometimes to facts within his knowledge and sometimes as an expert. He showed his competency as an expert satisfactorily to both parties. If the appellees sometimes felt that he gave way to the influence of his relations, they are not disposed to question his general fairness.

Mr. Taylor is the Auditor and Mr. Randall is the Freight Auditor of the Burlington. They furnish statistics of the lines, earnings, expenses and business

of their Company. Their figures differ from those given by Mr. Dilworth, which is explained by the fact that they speak of the business of their Company for the year ending December 31st, 1892, while Mr. Dilworth speaks of business for the year ending June 30th, 1892.

Mr. Van Kuran is the Freight Auditor of the Union Pacific, and gives some statistics of the business of his Company.

Mr. Albert Fink is a gentleman of great experience and national reputation as a railroad manager and statician. He speaks to only a single point involved in the present inquiry. Mr. John E. Utt has extensive experience in all the matters to which he speaks, but the information he gives, like that of Mr. Fink, touches the present investigation in only one point.

Mr. Dilworth, having been called by the appellants, showed himself qualified by personal knowledge and also as an expert to speak to the matters upon which he was examined. He produced a table made up of very interesting statistics relating to the business of these Companies and testified to their accuracy. His table will be found on page 932 of the record. It does not show for what year it was made, but on cross-examination he stated that it was for the year ending June 30th, 1892. (Page 975.) That was the best year the railroads ever saw in Nebraska. (Page 543.) Afterwards he prepared and presented a like table for the years ending on the same day,

1891 and 1893. (Page 977.) He also prepared and presented another table containing many other statistics for these three years, 1891, 1892, and 1893, all ending on the 30th of June of each year. (Page 980.)

This table, among other things, gives the percentage of the expenses to earnings of each Company for each year. He afterwards testified that the percentage of expenses to earnings given by him in the table is on the entire business done by the Railroad Companies; that is, business going through the State, business originating in and going out of the State, business originating out of the State and destined to points within it, and business originating at and destined to points in the State. He further says that the expenses of local business — that is, business originating at and destined to points within the State — is probably ten per cent more than that of all business; it might run up to twenty per cent and probably might be higher than that. (Pp. 1361 and 2.)

Mr. Dilworth also testified that the statutory rates are 29½ per cent less than those charged by the Companies, and all parties have accepted that as the measure of reduction caused by the bill.

Mr. Fink says that it costs four times as much to do local as through business, and explains why this is true. (Pp. 659–661.)

Mr. Utt says that it costs six times as much to do local as through business, and gives his reason for this opinion. (Pp. 438–442.) We are well within the mark

when we take 15 per cent as the cost of doing local business over that of doing all business.

With these sources of information we are able to ascertain whether the statutory rates allowed by House Roll 33, if applied to the business of these Companies in the three years, 1891, 1892, and 1893, would have paid their operating expenses.

For the purpose of showing the result of Mr. Dilworth's figures we will present the calculation for each Company in each of the years, taking the amount received for tons hauled locally from the tables on pages 932 and 977, the percentage of expenses to earnings on all business from the table on page 980, the additional cost of local business, estimated at 15 per cent, already shown to be more than fair, and reductions by the bill, 29.50 per cent, the figures of which are stated in tables on pages 932 and 977. It is a very simple calculation.

THE BURLINGTON.

YEAR 1891.

Total amount received for tons hauled locally		$1,066,871
Deduct percentage of expenses to earnings on all business 66.24 per cent	$706,695	
Additional cost of local business, 15 per cent	160,030	
And the reduction by the bill, 29.50 per cent	314,726	1,181,451
Loss by the bill		$114,580

YEAR 1892.

Total amount received for tons hauled locally		$1,237,884
Deduct percentage of expenses to earnings on all business 64.23 per cent	$795,092	
Additional cost of local business, 15 per cent	185,682	
And the reduction by the bill, 29.50 per cent	365,175	1,345,949
Loss by the bill		$108,065

YEAR 1893.

Total amount received for tons hauled locally		$1,242,416
Deduct percentage of expenses to earnings on all business, 65.51 per cent	$813,906	
Additional cost of local business, 15 per cent	186,362	
And the reduction by the bill, 29.50 per cent	366,512	1,366,780
Loss by the bill		$124,364

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA.

YEAR 1891.

Total amount received for tons hauled locally		$110,933
Deduct percentage of expenses to earnings on all business, 70.78 per cent	$78,518	
Additional cost of local business, 15 per cent	16,639	
And the reduction by the bill, 29.50 per cent	32,725	127,882
Loss by bill		$16,949

YEAR 1892.

Total amount received for tons hauled locally		$123,033
Deduct percentage of expenses to earnings, on all business, 65.96 per cent	$81,152	
Additional cost of local business, 15 per cent	18,454	
And the reduction by the bill, 29.50 per cent	36,294	135,900
Loss by the bill		$12,867

YEAR 1893.

Total amount received for tons hauled locally		$142,542
Deduct percentage of expenses to earnings, on all business, 64.58 per cent	$92,053	
Additional cost of local business, 15 per cent	21,381	
And the reduction by the bill, 29.50 per cent	42,049	155,483
Loss by the bill		$12,941

FREMONT, ELKHORN & MISSOURI VALLEY.

YEAR 1891.

Total amount received for tons hauled locally		$348,408
Deduct percentage of expenses to earnings on all business, 49.87 per cent	$173,751	
Additional cost of local business, 15 per cent	52,261	
And the reduction by the bill, 29.50 per cent	102,780	328,792
Surplus		$19,616

YEAR 1892.

Total amount received for tons hauled locally		$336,714
Deduct percentage of expenses to earnings on all business, 70.71 per cent	$238,090	
Additional cost of local business, 15 per cent	50,507	
And the reduction by the bill, 29.50 per cent	99,330	387,927
Loss by the bill		$51,213

YEAR 1893.

Total amount received for tons hauled locally		$424,437
Deduct percentage of earnings to expenses on all business, 55.66 per cent	$236,241	
Additional cost of local business, 15 per cent	63,665	
And the reduction by the bill, 29.50 per cent	125,208	425,114
Loss by the bill		$677

UNION PACIFIC.

YEAR 1891.

Total amount received for tons hauled locally		$278,211
Deduct percentage of expenses to earnings on all business, 68.94 per cent	$191,798	
Additional cost of local business, 15 per cent	41,731	
And the reduction by the bill, 29.50 per cent	82,072	315,601
Loss by the bill		$37,390

YEAR 1892.

Total amount received for tons hauled locally		$398,262
Deduct percentage of expenses to earnings on all business, 56.44 per cent	$224,779	
Additional cost of local business, 15 per cent	59,739	
And the reduction by the bill, 29.50 per cent	117,487	402,005
Loss by the bill		$3,743

YEAR 1893.

Total amount received for tons hauled locally		$413,714
Deduct percentage of expenses to earnings on all business, 58.51 per cent	$242,064	
Additional cost of local business, 15 per cent	62,057	
And the reduction by the bill, 29.50 per cent	122,045	426,166
Loss by the bill		$12,452

OMAHA & REPUBLICAN VALLEY.

YEAR 1891.

Total amount received for tons hauled locally		$75,581
Deduct percentage of expenses to earnings on all business, 120.26 per cent	$90,893	
Additional cost of local business, 15 per cent	11.337	
And the reduction by the bill, 29.50 per cent	22,296	124,526
Loss by the bill		$48,945

YEAR 1892.

Total amount received for tons hauled locally		$88,335
Deduct percentage of expenses to earnings on all business, 93.12 per cent	$82,257	
Additional cost of local business, 15 per cent	13,250	
And the reduction by the bill, 29.50 per cent	26,058	121,565
Loss by the bill		$33,230

YEAR 1893.

Total amount received for tons hauled locally		$80,519
Deduct percentage of expenses to earnings, on all business, 94.14 per cent	$75,800	
Additional cost of local business, 15 per cent	12,077	
And the reduction by the bill, 29.50 per cent	23,753	111,630
Loss by the bill		$31,111

ST. JOE & GRAND ISLAND.

YEAR 1891.

Total amount received for tons hauled locally		$21,817
Deduct percentage of expenses to earnings, on all business, 96.44 per cent	$21.040	
Additional cost of local business, 15 per cent	3,272	
And the reduction by the bill, 29.50 per cent	6,436	30,748
Loss by the bill		$8,931

YEAR 1892.

Total amount received for tons hauled locally		$31,004
Deduct percentage of expenses to earnings, on all business, 74.23 per cent	$23,014	
Additional cost of local business, 15 per cent	4,550	
And the reduction by the bill, 29.50 per cent	9,146	36,710
Loss by the bill		$5,706

YEAR 1893.

Total amount received for tons hauled locally		$33,802
Deduct percentage of expenses to earnings, on all business, 62.05 per cent	$20,974	
Additional cost of local business, 15 per cent	5,070	
And the reduction by the bill, 29.50 per cent	9,971	36,015
Loss by the bill		$2,213

KANSAS CITY & OMAHA.

YEAR 1891.

Total amount received for tons hauled locally		$6,732
Deduct percentage of expenses to earnings on all business, 99.54 per cent	$6,701	
Additional cost of local business, 15 per cent	1,009	
And the reduction by the bill, 29.50 per cent	1,985	9,695
Loss by the bill		$2,963

YEAR 1892.

Total amount received for tons hauled locally		$6,630
Deduct percentage of expenses to earnings on all business, 75.19 per cent	$4,985	
Additional cost of local business, 15 per cent	994	
And the reduction by the bill, 29.50 per cent	1,955	7,934
Loss by the bill		$1,304

YEAR 1893.

Total amount received for tons hauled locally		$9,445
Deduct percentage of expenses to earnings on all business, 76.50 per cent	$7,225	
Additional cost of local business, 15 per cent	1,416	
And the reduction by the bill, 29.50 per cent	2,786	11,427
Loss by the bill		$1,982

Mr. Taylor (593) gives the earnings of the Burlington on what he calls "Nebraska proper" business—that is, "business originating and terminating in Nebraska"—at $1,853,036.50, and he assigns to the expense of "Nebraska proper" freight, $1,221,742.84. To this is to be added excess of cost of local over all business of 15 per cent—that is, $183,256.30—and 29½ per cent being reductions caused by the bill—that is, $546,645.62. These figures show the following:

Earnings		$1,853,036.50
Deduct expense	$1,221,742.84	
15 per cent excess on local	183,356.30	
29½ reductions by the bill	546,645.62	1,951,744.76
Loss		$98,608.26

Mr. Randall verifies these figures. (Page 630.) He had previously testified that operating expenses were $972.183.70, but he corrects these figures.

In stating our method of ascertaining whether the statutory rates were reasonable, we said that it was subject to correction; that if conditions and circumstances changed, rates at one time reasonable might become unreasonably high or low. The conditions of the business of the railroads in Nebraska for six months following the passage of this act, did undergo a great change; the change was greatly for the worse. Mr. Taylor shows that the business of his Company for the last six months of 1893 was 25 per cent less than for the same period of 1892. (1639.)

A table on page 1528 shows the business of the Union Pacific for the months from January to June, both inclusive, for the two years 1892 and 1893, and that the earnings for the half of the latter year were $6,443,208.87 less than for the same period of the previous year. Another table, on page 1328, shows that down to and including March, 1894, there was a decrease of 3,405,410 loaded cars and of 1,610,624 empties.

A table on page 1529 shows a falling off of earnings of $7,081,696.52 in 1893 from earnings in 1892. These enormous figures are for the whole Union Pacific system, but they show a general condition which prevailed as well in Nebraska as elsewhere.

It is matter of common knowledge that the State

lost almost its entire crop in 1894, and had less than half a crop in 1895. As the business before the passage of the act would not have borne the reductions, much less could the business after its passage bear them.

Mr. VanKuran, (617), speaking of the business of the Union Pacific, is not able to furnish very specific information. He says that his Company earned on all its business in Nebraska, in the year ending June 30 1892, $4,313,204.46; and that he has not the figures as to the business beginning and ending in the State, but that it is about 15 per cent of the earnings. This is too indefinite to be of much value. The difference between these figures and those of Mr. Dilworth is too great to be explained, except by taking VanKuran's guess as wide of the mark.

There is another method of illustrating the operation of this act. If we add the per cent of the cost of doing the business and the reductions caused by the bill, and find that they exceed the possible maximum of 100 per cent, it is clear that the statutory rates would not yield to the Companies cost of the business.

The figures are these:

THE BURLINGTON.

YEAR 1891.

Percentage of expenses to earnings on all business.	66.24
Add additional cost of local business.	15.00
And the reduction by the bill	29.50
	110.74

Loss by the bill, 10.74 per cent.

YEAR 1892.

Percentage of expenses to earnings on all business	64.23
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	108.73

Loss by the bill, 8.73 per cent.

YEAR 1893.

Percentage of expenses to earnings on all business	65.51
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	110.01

Loss by the bill, 10.01 per cent.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA.

YEAR 1891.

Percentage of expenses to earnings on all business	70.78
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	115.28

Loss by the bill, 15.28 per cent.

YEAR 1892.

Percentage of expenses to earnings on all business	65.96
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	110.46

Loss by the bill, 10.46 per cent.

YEAR 1893.

Percentage of expenses to earnings on all business	64.58
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	109.08

Loss by the bill, 9.08 per cent.

FREMONT, ELKHORN & MISSOURI VALLEY.

YEAR 1891.

Percentage of expenses to earnings on all business	49.87
Add additional cost of local business	15.00
Add the reduction by the bill	29.50
	94.37

Surplus, 5.63 per cent.

YEAR 1892.

Percentage of expenses to earnings on all business	70.71
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	115.21

Loss by the bill, 15.21 per cent.

Year 1893.

Percentage of expenses to earnings on all business	55.66
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	100.16

Loss by the bill, .16 per cent

UNION PACIFIC.

YEAR 1891.

Percentage of expenses to earnings on all business	68.94
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	113.44

Loss by the bill, 13.44 per cent.

YEAR 1892.

Percentage of expenses to earnings on all business	56.44
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	100.94

Loss by the bill, .94 per cent.

YEAR 1893.

Percentage of expenses to earnings on all business	58.51
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	103.01

Loss by the bill, 3.01 per cent.

OMAHA & REPUBLICAN VALLEY.

YEAR 1891.

Percentage of expenses to earnings on all business	120.26
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	164.76

Loss by the bill, 64.76 per cent.

YEAR 1892.

Percentage of expenses to earnings on all business	93.12
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	137.62

Loss by the bill, 37.62 per cent.

YEAR 1893.

Percentage of expenses to earnings on all business	94.14
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	138.64

Loss by the bill, 38.64 per cent.

ST. JOE & GRAND ISLAND.

YEAR 1891.

Percentage of expenses to earnings on all business	96.44
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	140.94

Loss by the bill, 40.94 per cent.

YEAR 1892.

Percentage of expenses to earnings on all business	74.23
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	118.73

Loss by the bill, 18.73 per cent.

YEAR 1893.

Percentage of expenses to earnings on all business	62.05
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	106.55

Loss by the bill, 6.55 per cent.

KANSAS CITY & OMAHA.

YEAR 1891.

Percentage of expenses to earnings on all business	99.54
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	144.04

Loss by the bill, 44.04 per cent.

YEAR 1892.

Percentage of expenses to earnings on all business	75.19
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	119.69

Loss by the bill, 19.69 per cent.

YEAR 1893.

Percentage of expenses to earnings on all business	76.50
Add additional cost of local business	15.00
And the reduction by the bill	29.50
	121.00

Loss by the bill, 21.00 per cent.

In making up these figures we have been looking only to operating expenses, without taking any account of the rights of stockholders to some return for the use of their property. The case calls for no attention to that matter, and by passing it by we are relieved of all necessity of following our learned adversaries in their denunciation of methods of railroad construction and management. If called on to do so, we could show the gross injustice of most of what is said.

Nor have we taken account of fixed charges upon the roads. We are not called on to do so, because operating expenses together with reductions caused by House Roll 33 absorb all of the earnings and leave nothing for interest on the mortgage debts.

But rates to be reasonable must be sufficient to yield to the Companies not only their operating expenses but interest on their mortgage debts. The State has by express statute authorized the Companies to contract debts and secure them by mortgage and to do all that such authority implies. The Companies, following the path pointed out to them, have made and put upon the market their bonds secured by their mortgage. These instruments have been bought by many persons. They have put their money into them on the faith of the action of the State; fully beliving, and being justified in believing, that they were a safe investment. It hardly savors of fair dealing for the State, after drawing the bondholders into their present predicament, to deny them the return of their capital. No honest

man would do so, and the integrity of the State should not be less sacred than that of her citizens.

It is said that the mortgage debt may exceed the value of the property. That does not change the right of the matter. But it is not true here. It is not pretended that these roads are not today worth $20,000 per mile, and the mortgages do not exceed that sum, the Union Pacific road excepted. Its first mortgage and the Government lien on its road stand on independent grounds. These charges, therefore, are not within the grounds of animadversion alleged here.

In every view, we are justified in presenting to the Court these charges as proper to be provided for by the earnings of the Companies.

There are certain charges upon the Union Pacific of a higher character than those generally resting on railroad properties. The act of Congress of 1862 granted to the Company a loan of Government bonds, and made them a lien in the nature of a mortgage upon all of its property, and secured them still further by forfeiture of the road and all rights, functions, immunities, and appurtenances thereunto belonging in case of its default in paying the bonds and interest. (Sec. 5.) The act of 1864 authorized the Company to make a mortgage at the rate of $16,000 per mile and postponed the Government lien to it. (Sec. 11.) The Thurman act required the Company to pay into a sinking-fund 25 per cent of its net earnings to further secure the Government debt. These three charges

must be promptly met, not only because they are liens upon the property to be paid as mortgage debts of other Companies, but because the first is a lien prior to that of the United States, and the others are property of the Government, and, therefore beyond the reach of the State.

Whatever may be said of fixed charges on state railroads, whether they are reasonable in amount or the money they represent was honestly or judiciously applied, Congress has placed these charges beyond such animadversion. The earnings of the Company must meet these charges.

These charges are upon a road running from Omaha to Ogden. As we are concerned with that part of it within the State of Nebraska, we must inquire how much is attributable to the milage therein. Knowing the mileage of the whole road and the whole debt, if we divide the latter by the former we have the amount per mile; and if we multiply that by the number of miles in Nebraska we have the sum to be contributed by the road in that State.

Earnings arising from the transportation of freight should not be charged with the whole burden, but it should contribute its share. With the information which this record contains, it is not difficult to ascertain what its share is. It may be found by the following process of elimination.

First—The charge is to be raised on all business, freight and passenger. As we are concerned only

with frieght earnings, passenger earnings are to be eliminated. All the witnesses say that earnings and expenses should be apportioned between these two classes of business, by assigning seventy per cent to freight and thirty to passenger. (p. 591.) Thirty per cent is, therefore, to be deducted from the whole charge to ascertain what part freight should bear.

Second — Freight earnings are upon carriage through the State, from the State to points without it, and from points without to those within it, called interstate business; and upon carriage originating in and destined to points within the State, called local business. We are concerned only with the latter, and must eliminate the earnings upon interstate business from the whole volume. What is left will be applicable to local business.

Mr. Mink (702) says the outstanding bonds secured by the first mortgage amount to $27,229,000. The road is 1029.49 miles long, which gives $26,449.02 per mile. There are 467 miles in Nebraska, so that $12,351,692 are attributable to the road in that State. The rate of interest on this sum is six per cent; that is, $741,101.54. This is what all Nebraska business must pay annually. Seventy per cent, the share which freight is to bear, is $518,771.06. It remains to find the proportion of local freight earnings to this whole sum. In his table on page 932, in next the last column, Mr. Dillworth gives "the amount received for freight hauled in Nebraska, including through and

local," as $4,284,793, and "total amount received for tons hauled locally," is $398,262. By dividing $398,-262 by $4,284,793, we find the per cent of local to total freight earnings in Nebraska, which is 9.03 per cent, and 9.03 per cent of $518,771.06 is $46,844.42. This is what local freight is to contribute to the interest on the first-mortgage debt.

Mr. Mink (710) gives the amounts paid by his Company under the Thurman act for each year from 1889 to 1892, both inclusive. For the last year, it was $1,338,044.34, upon both the Kansas and Nebraska lines. Of this sum from 80 per cent to 85 per cent appertains to the Omaha and Ogden Line. Taking it at 80 per cent, we have $1,070,435.47. This sum, reduced to local freight by the process pursued above, gives 21,030.93 chargeable to that item.

Taxes (1640) paid in this State were in 1892 $237,-297.56, which, reduced to local freight in the same way, were $21,427.96.

These sums are as follows:

First Mortgage	$46,844.42
Thurman act	21,030.93
State taxes	21,427.96
	$89,303.31

There are two other mortgages which should properly be carried into the account, but as they may give rise to objection we shall pass them by. If this sum of $89,303.31 be added to the operating expenses and reduction caused by House Roll 33, shown in

Dillworth's table at page 932, a very large deficiency in each of the years will appear. The result would be the inability of the Company to answer the demands of the Government upon it and its utter destruction.

The facts relating to the Burlington in 1892 will be presented in the same way. The State taxes paid by this Company in that year were $503.971.04. (1640.) In order to learn how much of this sum is chargeable to local freight, we must first find the proportion which it bears to all the business in the State. As in the former case, we find in Mr. Dilworth's table, on page 932, that "the amount received for freight hauled in Nebraska, including through and local" was $5,538,766, and local freight earnings $1,237,884. By dividing $1,237,844 by $5,538,766 we have 22.44 per cent of local to total freight earnings in Nebraska; and this per cent of $503,971.04 is $112,889.51, which is what local freight should contribute to the payment of taxes. Mr. Taylor states, at pages 587 to 589, both inclusive, the mortgages on the roads, and that the annual interest is $2,224,171.17. This sum to be raised out of all the earnings of the Company in the State, reduced to local freight by the process already pursued, is $498,214.34. Mr. Dillworth states that the reduction caused by the bill is $365,175 (see his table, p. 932), and that the cost of doing the business was 64.23 per cent of the earnings, which is $795,092. These four sums aggregate $1,771,370.85. The total amount received from tons hauled locally is $1,237,-

844, which deducted from the other sum leaves a deficiency of $533,486.85 to meet its expenses, taxes and fixed charges.

It does not seem to be worth while to go through the statistics furnished by Mr. Dillworth in respect of all the roads. We have thrown them into a table attached to this brief, so that the exact facts in every possible view may be seen at a glance.

The result of the most searching examination, conducted by any appropriate process, will show that under House Roll 33 these Companies are shorn to the skin, and must be left powerless to meet their duties to the public and their creditors and the Government, and to maintain their existence.

FOURTH POINT.

It has been decisively shown that these statutory rates, if put in force, never would to this day yield to the Companies revenue sufficient to cover the expense of doing the business. That has been done by applying them to the business for some years before the passage of the act, and has been supplemented by showing that the conditions of these years were changed greatly for the worse, from the date of the act down to the closing of the testimony and even to the present moment.

The injustice of the act has been made even more

conspicuous, by the further showing that under its operation nothing would have been realized by the Companies from this business, to meet the share of taxes and fixed charges which that business should fairly contribute.

The result is that the property of the Companies, or the use of it, which is the same thing, is taken by the act for public use without any compensation.

Against such violence, these Companies are protected by the Constitution of the United States. So this Court has declared.

In the Railroad Commission Cases, 116 U. S. 307, 331, while the legislative power to fix rates was sustained, Chief Justice Waite, speaking for the Court, in order to guard against any unjust application of that doctrine, took pains to say:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

This language was quoted with approval in Dow v. Beidelman, 125 U. S. 680, 689. In the Chicago & St. Paul Railway v. Minnesota, 134 U. S. 418, 458, Mr.

Justice Blatchford, delivering the opinion of the Court, said:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring process of law for its determination."

In the Chicago & Grand Trunk Railway v. Wellman, 143 U. S. 339, 344, Mr. Justice Brewer, speaking for the Court, said:

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

In Reagan v. Farmers' Loan & Trust Company, 154 U. S. 362, 399, Mr. Justice Brewer, again speaking for the Court, said:

"In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the fourteenth amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a Government of law, and not a Government of men; and it must never be forgotten that under such a Government, with its constitutional limitations and guarantees, the forms of law

and the machinery of Government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

FIFTH POINT.

Maximum rates, when fixed by the legislature must, in order to be reasonable, be so high as to leave the Companies free to raise and lower them as they may be compelled to do by the law of supply and demand.

1. Reasonable rates are such as are fixed with a fair and just regard to the conditions and circumstances of the service to be rendered: and this, no matter who makes them; whether the Companies, the legislature or an administrative body. Rates otherwise fixed are arbitrary and necessarily unreasonable. When the legislature undertakes this business two methods are open to it: it may create a commission and clothe it with authority to frame a tariff with the force of a statute, or it may act directly and fix the rates itself.

The advantage of the former method and the difficulties in the way of the other have been stated by the Courts.

In Tilley v. The Savannah, Florida & Western R.

Co., 5 Fed. 641, Mr. Justice Woods, of this Court, sitting at the circuit, speaking of this matter, said at page 656:

"The fixing of just and reasonable maximum rates for all the railroads in the State is clearly a duty which cannot be performed by the legislature, unless it remains in perpetual session and devotes a large portion of its time to its performance. The question, what are just and reasonable rates, is one which presents different phases from month to month, upon every road in the State, and in reference to all the innumerable articles and products that are the subject of transportation. This question can only be satisfactorily solved by a board which is in perpetual session, and whose time is exclusively given to the consideration of the subject.

"It is obvious that to require the duty of prescribing rates for the railroads of the State to be performed by the general assembly, consisting of a senate with 44 members and a house of representatives with 175, and which meets in regular session only once in two years, and then only for a period of forty days, would result in the most ill-advised and haphazard schedules, and be productive of the greatest inconvenience and injustice, in some cases to the railroad companies, and in others to the people of the State. It is impracticable for such a body to prescribe just and reasonable rates. To insist that this duty must be performed by the general assembly itself, is to defeat the purpose of that clause of the constitution under consideration."

In the Chicago & Northwestern Railway Company v. Dey, 35 Fed. R. 866, Judge Brewer, being called on to consider the same matter, said:

"That which would be fair and reasonable today, six months or a year hence may be either too high or low. The legislature convenes only at stated periods; in this state, once in two years. Justice will be more likely done, if this power of fixing rates is vested in a body in continual session, than if left with one meeting only at stated and long intervals. Such a power can change rates at any time, and thus meet the changing conditions and circumstances."

The legislature of Nebraska declined to create a commission with proper powers, and saw fit to act directly. It passed House Roll 33 on the 13th of April, 1893. As it sits biennially, the rates it fixed then were for two years, at least. In that period great changes in conditions and circumstances were possible. Accordingly, as it was the duty of the legislature, acting in the early part of 1893, to take into account the conditions and circumstances of the service then existing, it was bound to look forward and allow for possible changes in the future. For instance, suppose, as was indeed measurably the fact, the conditions were favorable in 1892; the harvest yielding a great increase, trade being active and emigration enormous, so that the roads were crowded with business. Under these circumstances the Companies could bear a reduction of their rates. The legislature sitting

the next winter with these facts before it, if bound to look to them alone, might be justified in reducing the rates. But, suppose, as was again the fact, the next year the conditions were reversed; the harvest a failure, trade dull and emigration checked, so that the cars were empty, the engines idle, and the tracks unfilled. These reverses would render the rates fixed under the favorable conditions of the year before, insufficient to meet the cost of doing the business. Could the legislature sitting early in 1893 have foreseen what was coming in the fall and afterwards, it would not have reduced the rates at all, or not as radically as they did.

This simple statement illustrates the duty of the legislature, when it undertakes to fix rates by statute, to provide against contingencies and make allowance for changes in the conditions and circumstances of the service, so that the rates may be accommodated thereto. Any other course will force upon the Companies unreasonable and arbitrary rates.

2. Most people, I think, look upon a railroad company as quite apart from all other persons; they assume that its property is not to be dealt with as any other property, and that its business is conducted on different principles to any others. Some think it possessed of an evil spirit and always doing malicious mischief. If people would stop to consider a moment, they would see that a railroad company is like all other persons, and its business governed by the same

natural laws as any other. Every railroad must stand on its own merits; if it run through a region with a large volume of business, if it was judiciously built and is honestly operated, it will make money. On the other hand, if it run through a region without business, if it was injudiciously built, or is dishonestly operated, it will become bankrupt. A man who engages in trade, no matter what his capital or industry or good intentions, if without judgment and acquaintance with prices so that he buys in too high a market, or if he lack foresight and does not calculate contingencies in values or demand for goods, will in time be overtaken by disaster. It is just so with a railroad; it is left alone, and must stand or fall by itself, just as must everybody else. Like the athlete who is infirm in wind or limb, the railroad whose system is infirm will fall out in the great race. It is the inexorable law of the business of railroads, as of everybody else, that "to him that hath shall be given, and from him that hath not shall be taken even that he hath."

3. There is another common error: it is generally supposed that a railroad makes its own rates arbitrarily and according to its own pleasure. A man goes into a station and sees hanging on the wall a sheet on which are set out very minutely the rates for many articles between many points; and he knows that the Company has made this sheet and set it up and makes its charges according to it. He at once assumes that it has done all this according to its own judgment, or, as

he would say, according to its own willfulness. He sees the farmer obliged to market his crop gathered after a season of toil, but unable to do so except by taking it to a distant market by rail. He hears the farmer ask the agent what the charges are and sees the agent look at the tariff sheet and quote the rate from it. It must be paid or the grain cannot be shipped: no one can reduce it. At once the man standing by sympathizes with the farmer, and thinks him hardly dealt by, because the Company makes its own charge and will not even discuss its fairness.

There never was a more ignorant or unjust misconception. No freight agent or any other railroad officer ever made a tariff. In the nature of things he cannot do it. There are certain forces operating upon him and upon rates, and all he can do is to interpret and obey those forces.

This is very simple: what is true of the railroad is true of everybody engaged in trade or any industry. The farmer takes a wagon-load of corn to market. He does not fix the price at which he will sell it: he must take the market price. Nor does the corn dealer fix the price at which he will buy it: he must pay the market price. And what the farmer must take and the dealer must pay is determined by the demand for the corn and the supply in the market. This law of supply and demand in the world of business is as

inexorable as the law of gravitation in the world of matter.

This law operates upon railroads in two ways. In the first place transportation is an article of purchase and sale just as much as corn, and the proportion of the supply and demand in a market governs rates as it does the price of corn. The more the means of transportation, whether by rail or water or ox team, the less the rates, and the less they are the higher the rates, the demand being the same in both cases. And the greater or less the business the greater or less the rates, the supply being the same. That is not, however, the more interesting aspect, for almost everywhere in this country the supply of transportation exceeds the demand.

This law of supply and demand operates upon railroads in another way. A railroad must have business or it will go to ruin: it will become "two streaks of rust." It cannot store transportation as the farmer may his corn. He may refuse to sell at the current price of fifty cents a bushel and haul it back to his home and crib it until it brings sixty. The road must do business, for a large proportion of its expenses and interest go on, whether it does business or not; and it is better to earn a little when it cannot get more, than nothing at all. The Nebraska farmer must ship his produce to market at (say) Omaha or Chicago by rail. If the current price there will not pay his expenses of raising and shipping his produce, including

cost of transportation, he will abandon his work. What he will do all his neighbors will do. Soon the road will be without business. When the price of farm products in Omaha or Chicago is low, because the supply exceeds the demand, the road must reduce its rates even below cost, if necessary, in order to keep its patrons in business until better prices come. Only by doing so can it live. Thus this great law of supply and demand, governing prices of articles to be transported, operates on railroads, just as much as the amount of, and call for transportation.

This statement of simple and familiar facts, shows that the tariff sheet which hangs on the wall of the station, and which the agent consults when he gives rates to one who has freight, is not the work of the Company, but is the result of economic forces beyond the control of anybody. What the Company will always seek to realize is cost and a fair profit. It may sometimes take less. It is better to take a little than nothing. Of course, it cannot do so always, or on all business. That, however, is matter for it to determine. If it sees fit to do so, for whatever reason, it is free to act on its own judgment, just as a trader may sell his goods for less than cost and less than the market price. The road is the Company's property, to use according to its own judgment.

4. But when the State steps into the transaction and divests the Company of its freedom, another principle comes into play. It reduces the rates which the Com-

pany, in the exercise of its rights over its own, has fixed for the use of its property, and does so for the public. It is a case of taking property for public use, and it must make compensation therefor. It cannot reduce the rates so low that the Company will not receive cost and a fair profit. We are not now concerned with the question of the measure of the profit. If it do not secure to the Company cost and a fair profit, it is guilty of confiscation. So this Court has said over and over again.

The question becomes interesting, how is the State to assure to a Company a due measure of compensation for the service rendered to the public. It may do so in either one of two ways. It may fix every rate high enough to pay cost and a fair profit on every shipment to which the rate applies. That is one way. But railroads always have charged different rates on different articles. They make one rate on pig iron and another on furniture; one on lumber and one on silk. And they must do so. If the same rates were exacted for the carriage of iron as of furniture, or of lumber as of silk, iron and lumber could not be profitably shipped. The effect of following that method of doing business would be to check the transportation of iron and lumber, and take from the Company all that class of business. If the same course were followed in respect of all low-class articles, a large proportion of the Company's business would be cut off. On the other hand, if the Company were compelled to carry furni-

ture at the same price as pig iron, or silk as cheaply as lumber, the service would be unprofitable and the Company would be driven out of business. It could not live in either case.

If the State deprives the Company of its freedom to do its business in its own way, and at the same time makes the rate on any article less than cost and a fair profit, it must make a rate on other articles high enough to cover the loss, and also guarantee an amount of the high-class freight sufficient for the purpose. It cannot impose on the road any risk in this matter. Whatever the risk, the State must take it, and adequately provide against it. That is a doctrine of the law of eminent domain. (Commonwealth v. Peters, 2 Mass. 125; The People v. Heyden, 6 Hill, 359; Connecticut River R. R. v. County Commissioners, 127 Mass. 50; Orr v. Quimby, 54 N. H. 590.) It is equally applicable here.

This record shows that the statutory rates on many shipments are far below cost; and the statute does not assure the Company any compensation for the loss by providing high-class freight to cover it.

This line of remark may be summarized thus:

1. A railroad, if left to the natural law of supply and demand, must sell transportation at what it can get, and take the chance of being able, on the whole, to make cost and a fair profit.

2. The State cannot require a road to work for less

than cost and a fair profit, for that would be confiscation.

3. If the State fix the rate at which transportation shall be sold, it must either

(1) fix every charge high enough to pay cost and a fair profit, or

(2) guarantee enough high-class freight to cover losses on low classes.

4. As statutory rates cannot be changed for a long time, at least two years, they must provide against possible changes of conditions, to which the road, when left to itself under the operation of the law of supply and demand, must for the sake of its own existence accommodate its rates.

The result may be then stated: Maximum rates fixed by the statute must, to be reasonable, be upon a line so high as to leave below it room for the play of the economic forces which dominate railroad companies when acting for themselves.

The contention of the other side is that reasonable maximum rates are such as the interests of the public require. It is supposed to be supported by the fact that the State grants to the companies their franchises and the right of eminent domain. So it does; and it also grants to them the right to charge rates which yield cost and a fair profit. It agrees not itself to fix any other rates. Besides, taking the use of a railroad for the public by reducing its rates, is just like taking any

other property by condemnation. When the State takes my house and lot for a public use, as for a road, or canal, or school-house, or court-house, it must pay me what it is worth in the market, not what the State can afford to pay, nor what it arbitrarily thinks enough; and if it takes the use of a railroad it must allow rates which pay cost and a fair profit, without regard to the public. The interests of the public have nothing to do with the matter. Left to itself the road may, and by its conditions is bound to consult the public interests, just as anyone may use his own as he will; but when the State applies its compulsion to the road, it is dealing with another's property, and its powers are strictly limited.

Much is said of unjust discrimination of railroads. That has nothing to do with the question, which is, did the State act within its constitutional competency when by the rates fixed in House Roll 33, it took the use of the Company's property without yielding to them even so much as cost of doing the business.

Comparison is made of the Nebraska and Iowa rates. The former are said to be 40 per cent higher than the latter. But the latter may be too low; and to make out the argument the Court must determine whether they are reasonable, which is the same question over again. Besides, the conditions in Iowa are much more favorable than in Nebraska, as Mr. Utt fully explains.

It is said that reductions of local rates in Nebraska will but slightly reduce the earnings of the Companies

on all their roads, which run through many States. This contention, if otherwise sound, invites us into a field where confusion quickly overtakes those who urge it. If you take account of interstate business in order to determine the reasonableness of local rates, you must take it into account for all purposes. And what results but that the local rates affect interstate business, which is beyond the reach of the State.

J. M. WOOLWORTH,
Solicitor for Appellees,
Of Counsel.

BURLINGTON & MISSOURI RIVER RAILROAD IN NEBRASKA.

Year.	Amount Received for Tons Hauled Locally.	Per Cent of Expenses to Earnings	Cost of Hauling Local Freight.	Net Earnings from Local Freight.	Reduction by House Bill 33.	Fixed Charges.		Result if House Bill 33 Had Been in Force.			
						Mortgage Interest to be paid by Local Freight.	Taxes to be Paid by Local Freight.	On Basis of Per Cent.		Including Fixed Charges.	
								66.24%	81.24%	66.24%	81.24%
1891	$1,066,871	66.24 15	$706,695 160,030	$360,176 160,030	$314,727	$498,214.34	$114,180.52	$45,449.00	-$114,581.00	-$566,945.86	-$726,975.86
		81.24	$866,725	$200,146							
								64.23%	79.23%	64.23%	79.23%
1892	$1,237,884	64.23 15	$795,092 185,682	$442,792 185,682	$365,175	$498,214.34	$112,889.51	$77,617.00	-$108,065.00	-$533,486.85	-$719,168.85
		79.23	$980,774	$257,110							
								65.51%	80.51%	65.51%	80.51%
1893	$1,242,416	65.51 15	$684,571 186,362	$557,845 186,362	$366,512	$498,214.34	$111,966.29	$191,833.00	$4,971.00	-$418,347.63	-$605,209.63
		80.51	$870,933	$371,483							

UNION PACIFIC RAILWAY.

Year.	Amount Received for Tons Hauled Locally.	Per Cent of Expenses to Earnings	Cost of Hauling Local Freight.	Net Earnings from Local Freight.	Reduction by House Bill 33.	Fixed Charges.		Result if House Bill 33 Had Been in Force.			
						Mortgage Interest to be paid by Local Freight.	Taxes to be paid by Local Freight.	On Basis of Per Cent.		Including Fixed Charges.	
								68.94%	83.94%	68.94%	83.94%
1891	$278,211	68.94	$191,798	$86,413	$82,072	$46,844.42	$21,939.73	$4,341.00	-$37,390.00	-$85,474.08	-$127,205.08
		15	41,731	41,731		(Thurman Act, $21,030.93)					
		83.94	$233,529	$44,682							
								56.44%	71.44%	56.44%	71.44%
1892	$398,262	56.44	$224,779	$173,483	$113,487	$46,844.42	$21,427.96	$59,996 00	$257.00	-$29,307.31	-$89,046.31
		15	59,739	59,739		(Thurman Act, $21,030.93)					
		71.44	$284,518	$113,744							
								58.51%	73.51%	58.51%	73.51%
1893	$413,714	58 51	$242,064	$171,650	$122,045	$46,844.42	$20,213.26	$49,605.00	-$12,452.00	-$38,483.61	-$100,540.61
		15	62,057	62,057		(Thurman Act, $21,030.93)					
		73 51	$304,121	$109,593							

ST. JOSEPH & GRAND ISLAND RAILWAY.

Year.	Amount Received for Tons Hauled Locally.	Per Cent of Expenses to Earnings	Cost of Hauling Local Freight.	Net Earnings from Local Freight.	Reduction by House Bill 33.	Fixed Charges.		Result if House Bill 33 Had Been in Force.			
						Mortgage Interest to be paid by Local Freight.	Taxes to be paid by Local Freight.	On Basis of Per Cent.		Including Fixed Charges.	
								96.44%	111.44%	96.44%	111.44%
1891	$21,817	96.44	$21,140	$677	$6,436	$72,072.00		-$5,759.00	-$9,031.00	-$77,831.00	-$81,103.00
		15	3,272	3,292							
		111.44	$24,412	-$2,595							
								74.23%	89.23%	74.23%	89.23%
1892	$31,004	74.23	$23,014	$7,990	$9,146	$72,072.00		-$1,156.00	-$5,806.00	-$73,228.00	-$77,878.00
		15	4,650	4,650							
		89.23	$27,664	$3,340							
								62.05%	75.05%	62.05%	75.05%
1893	$33,802	62.05	$20,974	$12,828	$9,971	$72,072.00		$2,857.00	-$2,213.00	-$69,215.00	-$74,285.00
		15	5,070	5,070							
		75.05	$26,044	$7,758							

FREMONT, ELKHORN & MISSOURI VALLEY RAILWAY.

Year.	Amount Received for Tons Hauled Locally.	Per Cent of Expenses to Earnings	Cost of Hauling Local Freight.	Net Earnings from Local Freight.	Reduction by House Bill 33.	Fixed Charges.		Result if House Bill 33 Had Been in Force.			
						Mortgage Interest to be paid by Local Freight.	Taxes to be paid by Local Freight.	On Basis of Per Cent.		Including Fixed Charges.	
								49.87%	64.87%	49.87%	64.87%
1891	$348,048	49.87 15	$173,571 52,207	$174,477 52,207	$102,674	$124,836.51	$45,159.58	$71,803.00	$19,596.00	-$98,193.09	-$150,400.09
		64.87	$225,778	$122,270							
								70.71%	85.71%	70.71%	85.71%
1892	$336,714	70.71 15	$238,090 50,507	$98,624 50,507	$99,330	$124,836.51	$47,885.53	-$706.00	-$51,213.00	-$173,428.04	-$223,935.04
		85.71	$288,597	$48,117							
								55.66%	70.66%	55.66%	70.66%
1893	$ 4,437	55.66 15	$236,241 63,665	$188,196 63,665	$125,209	$124,836.51	$42,919.42 (Incomplete)	$62,987.00	-$678.00	-$104,768.93	-$168,433.93
		70.66	$299,906	$124,531							

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY.

Year.	Amount Received for Tons Hauled Locally.	Per Cent of Expenses to Earnings	Cost of Hauling Local Freight.	Net Earnings from Local Freight.	Reduction by House Bill 33.	Fixed Charges.		Result if House Bill 33 Had Been in Force.			
						Mortgage Interest to be paid by Local Freight.	Taxes to be paid by Local Freight.	On Basis of Per Cent.		Including Fixed Charges.	
								70.78%	85.78%	70.78%	85.78%
1891	$110,933	70.78	$78 518	$32,415	$32,735			$310.00	-$16,950.00		
		15	16,640	16,640							
		85.78	$95,158	$15,775							
								65.93%	80.93%	69.53%	80.93%
1892	$123,033	65.93	$81,152	$41,881	$36,295			$5,586.00	-$12,869.00		
		15	18,455	18,455							
		80.93	$99,607	$23,426							
								64.58%	79.58%	64.58%	79.58%
1893	$142,542	64.58	$92,053	$50,489	$42,050			$8,439.00	-$12,942.00		
		15	21,381	21,381							
		79.58	$113,434	$29,108							

OMAHA & REPUBLICAN VALLEY RAILWAY.

Year.	Amount Received for Tons Hauled Locally.	Per Cent of Expenses to Earnings	Cost of Hauling Local Freight.	Net Earnings from Local Freight.	Reduction by House Bill 33.	Fixed Charges.		Result if House Bill 33 Had Been in Force.			
						Mortgage Interest to be paid by Local Freight.	Taxes to be paid by Local Freight.	On Basis of Per Cent.		Including Fixed Charges.	
								120.26%	135.26%	120.26%	135.26%
1891	$75,581	120.26 15	$90,893 11,337	-$15,312 11,337	$22,296	$30,197.16	-$8,284.72	-$37,608.00	-$48,945.00	-$76,089.88	-$87,426.88
		135.26	$102,230	-$26,649							
								93.12%	108.12%	93.12%	108.12%
1892	$88,335	93.12 15	$82,257 13,250	$6,078 13,250	$26,059	$30,197.16	$7,431.11	-$19,981.00	-$33,281.00	-$57,609.27	-$70,909.27
		108.12	$95,507	-$7,172							
								94.14%	109.14%	94.14%	109.14%
1893	$80,519	94.14 15	$75,800 12,078	$4,719 12,078	$23,753	$30,197.16	$6,960.57	-$19,034.00	-$31,112.00	-$56,191.73	-$68,269.73
		109.14	$87,878	-$7,359							

KANSAS CITY & OMAHA RAILWAY.

Year.	Amount Received for Tons Hauled Locally.	Per Cent of Expenses to Earnings	Cost of Hauling Local Freight.	Net Earnings from Local Freight.	Reduction by House Bill 33.	Fixed Charges.		Result if House Bill 33 Had Been in Force.			
						Mortgage Interest to be paid by Local Freight.	Taxes to be paid by Local Freight.	On Basis of Per Cent.		Including Fixed Charges.	
								99.54%	114.54%	99.54%	114.54%
1891	$6,732	99.54	$6,701	$31	$1,986			-$1,955.00	-$2,964.00		
		15	1,009	1.009							
		114.54	$7,710	-$978							
								75.19%	90.19%	75.19%	90.19%
1892	$6,630	75.19	$4,985	$1,645	$1,956			-$311.00	-$1,305.00		
		15	994	994							
		90.19	$5,979	$651							
								76.50%	91.50%	76.50%	91.50%
1893	$9,445	76.50	$7,225	$2,220	$2,786			-$566.00	-$1,983.00		
		15	1,417	1,417							
		91.50	$8,642	$803							

SUPREME COURT OF THE UNITED STATES.

ARTHUR S. CHURCHILL et al., *Appellants*,
v.
OLIVER W. AMES et al.

ARTHUR S. CHURCHILL et al., *Appellants*,
v.
GEORGE SMITH et al.

ARTHUR S. CHURCHILL et al., *Appellants*,
v.
HENRY L. HIGGINSON et al.

MR. WOOLWORTH'S BRIEF FOR APPELLEES.

These are appeals against decrees of the Circuit Court of the United States for the District of Nebraska. They were bills filed in that Court on the 28th of July, 1893. One of them was filed by the plaintiffs as stockholders of the Union Pacific Railway Company against that Company the St. Joseph & Grand Island Railroad the Omaha & Republican Valley Railway and the Kansas City & Omaha Railway Companies, and against certain officers of the State of Nebraska who constitute its Board of Transportation, and the three Secretaries of the Board. The second was filed by the plaintiffs as stockholders of the Chicago & North-Western Railway Company against that Company, and the Fremont Elkhorn & Missouri Valley Railway and the Chicago St. Paul Minneapolis & Omaha Railway Companies, and against the officers of the State who were impleaded in the first bill mentioned. The third bill was filed by the plaintiffs as stockholders of the Chicago Burlington & Quincy Railroad Company against that Company and the same officers of the State as those above mentioned.

In the two bills firstly and secondly mentioned above, the Railroad Companies were, in one the Union Pacific Railway Company and its subsidiary Companies, all of whose stock and bonds it owned and whose administration and management were directed by its officers, and in the second, the Chicago & North-Western Railway Company was the principal Company, and the others were subsidiary Companies whose policy, administration and management were in the hands of the parent Company. In the course of the testimony, the lines of the Chicago Burlington & Quincy Railroad Company west of the Missouri River are called the Burlington & Missouri Railroad or System; which lines belong to the Chicago Burlington & Quincy Company and are operated by it; but it has been found to be a convenient method of administration and accounting to operate the lines west of the Missouri River under the name of the Burlington & Missouri River Railroad, that being the name under which the system was originally built and formed and was operated, until the same was acquired by the Chicago Company.

In these bills complaint is made of an act of the Legislature of the State of Nebraska, passed on the 12th of April, 1892, called in these records "House Roll No. 33," and entitled "An Act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this Act." The Act, excepting certain details, is as follows:

Section 1.—The provisions of this Act shall apply, except as in this Act otherwise provided, to all Railroad Corporations and Railroad Companies and to any common carrier, or carriers, engaged in this State in the transportation of freight by railroad therein, and shall also be held to apply to shipments of property made from any point within the State to any other point within the State. The term "railroad," as used in this Act, shall include all bridges and ferries used or

operated in connection with any railroad, and also all the road in use by any Corporation, Receiver, Trustee, or other person operating a railroad, whether owned or operated under contract, agreement, lease, or otherwise, and the term "transportation" shall include all instrumentalities of shipment or carriage, and the term "Railroad Corporation" contained in this Act shall be deemed and taken to mean all corporations, companies, or individuals, now owning or operating, or which may hereafter own or operate any railroad, in whole or in part, in this State, and the provisions of this Act, except as in this Act otherwise provided, shall apply to all persons, firms, and companies, and to all associations of persons, whether incorporated or otherwise, that shall do business as common carriers of freight upon any of the lines of railway in this State, the same as to Railroad Corporations herein mentioned.

Sec. 2.—That all freight or property to be transported by any Railroad Company or Companies mentioned in the preceding section, from any point in the State of Nebraska to any other point in said State, shall be classified as hereinafter in this section provided, and any other or different classification of freight, which would raise the rates on class or commodity of freights above the rates prescribed in this Act, except as hereinafter otherwise provided, is prohibited and declared to be unlawful. The classification established by this Act shall be known as the "Nebraska Classification." Freights shall be billed at the actual weight, unless otherwise directed in the classification—twenty thousand pounds shall be a carload, and all excessive weights shall be at the same rate per hundred pounds, except in carloads of light and bulky articles, and unless otherwise specified in the classification. When the classification makes an article "released" or "owner's risk," the same at carrier's risk will be the next highest rate higher, unless otherwise provided in the classification. Articles rated first-class, "released" or owner's risk, if taken at "carrier's risk" will be 1½ times first-class, unless otherwise

provided in the classification. All articles carried according to this classification at "owner's risk" of fire, leakage, damage, or breakage, must be so receipted for by agents of the railroad, and so considered by owners and shippers. Signing a release contract by a shipper shall not release the Railroad Company for loss or damages caused by carelessness or negligence of its employees.

THE NEBRASKA CLASSIFICATION—EXPLANATION OF CHARACTERS.

The class is given opposite each article; 1, 2, 3, 4, and 5, stand for first, second, third, fourth, and fifth classes, respectively; 1½ for one and one-half first class, D; 1 for double first-class; 2½ for two and one-half times first class; 3 t 1, for three times first class; 4 t 1, for four times first class; O. R., for owner's risk; C. R., carrier's risk; S. U., set up; K. D., for knocked down; C. L., for carload; L. C. L., for less than carload; P. P., for prepaid; N. O. S., for not otherwise specified in this classification; classes A, B, C, D, and E, refer to tables of rates. The figures or letters in the first column to the right of the various articles in the classification refer to less than carload lots, and those in the second column refer to the rate in carload lots.

Here follow tables of classification.

Sec. 3.—That each of the railroads in the State of Nebraska shall charge for the transportation of freight from any point in said State to any other point in said State, no higher or greater rate of charge than is by this Act fixed as the reasonable maximum rate for the distance hauled, and the reasonable maximum rates for the transportation of freight by railroad from any point in the State of Nebraska to any other point in said State are declared and established to be as hereinafter in this section fixed for the distance named, and any higher or greater rate for the distance hauled than that herein fixed and established, is prohibited and declared to be unlawful; and the reasonable maximum rate herein fixed and es-

tablished shall be known as the Nebraska Schedule of Reasonable Maximum Rates.

Here follow tables of rates.

Sec. 4.—All railroads or parts thereof which have been built in this State since the first day of January, 1889, or may be built before the 31st day of December, 1899, shall be exempt from the provisions of this Act until the 31st day of December, 1899.

Sec. 5.—Whenever any railroad company or companies in this State shall, in a proper action, show by competent testimony that the schedule of rates prescribed by this Act are unjust and unreasonable, such railroad or railroads shall be exempt therefrom as hereinafter provided. All such actions shall be brought before the Supreme Court, in the name of the railroad company or companies bringing the same, and against the State of Nebraska, and upon the hearing thereof, if the Court shall become satisfied that the rates herein prescribed are unjust in so far as they relate to the railroad bringing the action, may issue their order directing the Board of Transportation to permit such railroad to raise its rates to any sum in the discretion of the Board: *Provided*, That in no case shall the rates so raised be fixed at a higher sum than that charged by such railroad on the first day of January, 1893. Whenever any railroad company in this State shall claim the benefit of the provisions of this section, it shall be the duty of such railroad company to show to the Court all matters pertaining to the management thereof, and if it shall appear that said railroad company is operating branch lines of railroad in connection with its main line, and all included in one system, then, and in that case, it shall be the duty of the railroad company to show to the Court upon which branch or branches, or upon which portion of such system, the schedule of rates prescribed in this act is unjust and unreasonable, and only such portions shall be exempted from the provisions thereof: *Provided*, That in no case shall a railroad company be allowed

to pool the earnings of all the lines operated under one management where more than one line is so operated, for the purpose of lowering the general average.

Sec. 6.—That the Board of Transportation is hereby empowered and directed to reduce the rates on any class or commodity in the schedule of rates fixed in this Act whenever it shall seem just and reasonable to a majority of said Board so to reduce any rate; and said Board of Transportation is hereby empowered and directed to revise said classification of freight as hereinbefore in this Act established whenever it shall appear to a majority of said Board just and reasonable to revise said classification: *Provided*, That said Board of Transportation shall never change the classification in this Act established so that by such change of classification the rates on any freight will become higher or greater than in this Act fixed. When any reduction of rates or revision of classification shall be made by said Board, it shall be the duty of said Board to cause notice thereof to be published two successive weeks in some public newspaper published in the city of Lincoln, in this State, which notice shall state the date of the taking effect of such change of rate or classification, and said change of rate or classification so made by the said Board and published in said notice, shall take effect at the time so stated in said notice.

Sec. 7.—That articles not enumerated in said classification in section two (2) of this Act established, not rated in said schedule of rates in section three (3) of this Act shall be classed with analogous articles in said classification, and where there is any conflict between said classification and said schedule of maximum rates, said rates shall govern.

Sec. 8.—That in case any common carrier subject to the provisions of this Act shall do, or cause to be done, or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing, in this Act required to be done, such common carrier

shall be liable to the person or persons injured thereby, for all damages sustained in consequence of any such violation of the provisions of this Act, together with cost of suit and a reasonable counsel or attorney's fee to be fixed by the Court in which the same is heard on appeal or otherwise, which shall be taxed and collected as part of the costs in the case: *Provided*, That in all cases demand in writing on said common carrier shall be made for the money damages sustained before suit is brought for recovery under this section, and that no suit shall be brought until the expiration of fifteen days after such demand.

Sec. 9.—That in case any common carrier subject to the provisions of this Act, shall do, or cause to be done, or permit to be done, any act, matter or thing, in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall, upon conviction thereof, be fined in any sum not less than one thousand ($1,000) dollars nor more than five thousand ($5,000) dollars for the first offense; and for the second offense not less than five thousand ($5,000) dollars nor more than ten thousand ($10,000) dollars; and for the third offense not less than ten thousand ($10,000) dollars nor more than twenty thousand ($20,000) dollars; and for every subsequent offense and conviction thereof, shall be liable to a fine of twenty five thousand ($25,000) dollars: *Provided*, That in all cases under this Act either party shall have the right of trial by jury.

This Act cannot be understood without reference to another passed at the session of 1887, entitled "An Act to regulate railroads, prevent unjust discrimination, provide for a Board of Transportation, and define its duties, and repeal articles 5 and 8 of chapter 72, entitled 'Railroads,' of the Revised Statutes, and all acts and parts of acts in conflict herewith;" the same being chapter 60 of the Session Laws of 1887, and article 8 of chapter 72 of the Compiled Statutes of 1895. A copy of the

Act is attached to this brief; but it will be convenient here to set forth such of its terms as show the constitution, powers and duties of the Board.

"Sec. 11. The Attorney General, Secretary of State, Auditor of Public Accounts, State Treasurer, and Commissioner of Public Lands and Buildings, shall constitute a Board of Transportation, which Board shall have power, by a four-fifths vote, to appoint three (3) Secretaries to assist in the performance of the duties of said Board, and they shall each be paid a salary of two thousand ($2,000) dollars per annum. Not more than two of the Secretaries shall be appointed from the same political party. The Secretaries of the Board shall take the oath of office prescribed for State officers, and shall enter into bonds, to be approved by the Governor, in the sum of ten thousand ($10,000) dollars, conditioned for the faithful performance of their duties. No persons in the employ of any railroad corporation, or holding stock in any railroad corporation, shall be employed as Secretary.

"Sec. 12. That the Board hereby created shall have authority to inquire into the management of the busines of ail common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted; and shall have the right to obtain from such common carriers full and complete information necessary to enable the Board to perform the duties, and carry out the objects for which it was created; and for the purposes of this Act the board shall have power to require the attendance and testimony of witnesses, and the production of all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation, and to that end may invoke the aid of any of the District Courts in this State, or of the Supreme Court, in requiring the attendance and testimony of witnesses, and the production of books, papers and documents under the provisions of this section; and anv court of competent jurisdiction, within the jurisdiction of which such inquiry is carried

on, may, in case of contumacy, or refusal to obey a subpœna issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier, or other person, to appear before said Board, (and produce books and papers if ordered,) and give evidence touching the matter in question; and any failure to obey such order of the Court may be punished by such Court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

The bills allege several objections to the validity of the Act first above set out, and pray decrees declaring it unconstitutional, and injunctions restraining the Companies from observing or conforming to its provisions, commands, injunctions and prohibitions, and the Board of Transportation from taking any proceedings to enforce them.

The cases were heard together on pleadings and proofs by Mr. Justice Brewer, sitting at the Nebraska Circuit. On the 12th of November, 1894, His Honor filed his opinion in the Clerk's office, holding against several of the contentions of the plaintiffs, but sustaining others; particularly that the Act was repugnant to the Constitution of the United States, because, under its provisions, the defendant Railway Companies could not exact for the transportation of freight from one point to another within the State, charges which would yield to them reasonable compensation for such service. On the 15th of the same month, decrees were entered granting the relief prayed in the bills, on the particular grounds stated above. The case is reported in 64 Fed. R. 65. From these decrees the Board of Transportation appeals to this Court.

FIRST POINT.

These decrees were right because the rates of charge prescribed and limited in the Act known as "House Roll 33" were insufficient to yield to the Companies reasonable compensation for their services in transporting property from one point to another within the State.

I. The doctrine has been firmly established by a long series of the judgments of this Court, beginning with the Granger Cases decided in the year 1876, that the Legislature may prescribe and limit the charges which railroad companies may make for their services in transporting persons and goods for the public. But this doctrine has been qualified and restrained. It has been again and again declared by this Court that the power of the legislature in this matter is not unlimited; that it cannot be carried so far as to require them to carry persons or property without reward, because the imposition of such charges would operate the taking of private property for public use without just compensation and without due process of law.

In the *Railroad Commission Cases*, 116 U. S. 307, 331, Mr. Justice Waite, speaking for the Court, while sustaining the legislative power to fix rates to be charged by railroad companies, in order to guard against any unjust application of the doctrine, took the precaution to say:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without re-

ward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

In *Dow v. Beidelman*, 125 U. S. 680, 689, Mr. Justice Gray, speaking for the Court, quoted this language with approval.

In *Georgia Bank Company v. Smith*, 128 U. S. 174, 179, Mr. Justice Field, delivering the opinion of the Court, said that the power of the legislature to prescribe the charges of a Railroad Company for the carriage of persons and merchandise is "subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation."

In the *Chicago & St. Paul Railway Company v. Minnesota*, 134 U. S. 418, 458, Mr. Justice Blatchford, speaking for the Court, said:

"If the Company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the Company is deprived of the equal protection of the laws."

In the *Chicago Railway Company v. Wellman*, 143 U. S. 339, Mr. Justice Brewer delivering the opinion of the Court, after reiterating the principle that an act of the legislature was not necessarily unconstitutional which fixed rates, said:

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates;" that is, against unreasonable rates prescribed and limited by an act of the legislature.

In *Budd v. New York*, 143 U. S. 517, Mr. Justice Blatchford said that the legislative "power of limitation or regulation is

not without limit, and is not a power to destroy or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law."

In *Reagan v. The Farmers' Loan & Trust Company*, 154 U. S. 362, 399, Mr. Justice Brewer, again speaking for the Court, said:

"In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the Fourteenth Amendment no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a Government of law and not a Government of men; and it must never be forgotten that under such a Government, with its constitutional limitations and guarantees, the forms of law and the machinery of Government with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

In the *St. Louis & San Francisco Railway v. Gill*, 156 U. S. 649, Mr. Justice Shiras, delivering the opinion of the Court, said in the course of it, "that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws."

And at this term, in *Covington & Lexington Turnpike Road*

Co. v. Sanford, 164 U. S. ~~198~~ 577, ~~204~~ 594, Mr. Justice Harlan, delivering the opinion of the Court, reviewed many of the cases above cited and said:

"A statute which, by its necessary operation, compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair, and from earning any dividends whatever for stockholders, is as obnoxious to the Constitution of the United States as would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect and receive tolls for passengers and freight."

II. The question of fact remains whether House Roll 33 limited the charges which railroad companies may make for the carriage of goods so that their earnings would not cover the cost of doing the business and some compensation therefor.

1. One method of determining whether rates prescribed by the Legislature are reasonable is to put them in force for one, two or three years, and at the end of a proper period ascertain from the accounts of the business what the Companies earned or lost. This method, however, is open to an obvious objection: if after statutory rates have been in operation a certain period it appears that the Companies have not realized any compensation for their services, the loss sustained by them cannot in any way be made good. They could not by action at law or otherwise compel parties whose goods have been transported to pay the difference between the charges actually accepted under the compulsion of the statute and charges which but for the statute would have been collected. Nor would the State which by its legislation forced losses upon the Companies afterwards make them good by appropriation out of the treasury. To be sure, after the fact that the statutory rates were unreasonable had been demonstrated by experience,

the Companies might apply to the Court for protection against them in the future; but even in that case they would be met by the pretension that however oppressive the rates had been, they might in the future by reason of possible changes of conditions and circumstances prove remunerative. It is not easy to see why such suggestion at the end of a limited period might not be as effectively made as it could if asserted as soon as the Act was passed. However that may be, to enforce statutory rates which are unreasonable in order to try their effect, and force upon the Companies the loss or the contingency of loss which they would sustain while the rates were being put to the test, and without any possibility of being reimbursed, is the worst conceivable case of taking private property without compensation. The pretense that parties must submit to such method of testing the reasonableness of rates shocks the conscience of an honest man. It is no better than hanging a man for murder and trying him afterwards.

2. There is another method of testing the reasonableness of statutory rates; it is to take the business for one, two, three or more years immediately before the passage of the Act and by applying the rates to it, ascertain what they would have yielded. For instance, suppose the case of a road with a paid up capital of four million dollars, earning in the year just before the statutory rates were prescribed, one million dollars per annum, of which sixty per cent or six hundred thousand dollars went to cost of operation, and forty per cent or four hundred thousand dollars to dividends. Now suppose the rates charged by the Company were reduced by statute so that had they been in force the year before, its earnings would have been only five hundred thousand dollars, while its operating expenses continued to be six hundred thousand dollars, so that not only would the stockholders receive no dividend, but the Company would sustain an actual loss of one hundred thousand dollars. Let this process be applied not only to the

business of one year immediately preceding the passage of the statute, but to the second and the third years and as far back as the inquiry could be carried, with the same result. This method would amount almost to a demonstration that the statutory rates will not in the future yield a reasonable return for the services rendered by the Company. This method is just as legitimate as the other; in one, as well as the other, actual figures taken from the accounts of the Company are dealt with, and no guesses or estimates or calculation of contingencies are indulged, while the process of computation is exactly the same. It is true that this method of testing the reasonableness of statutory rates by applying them to the business of past years does not and cannot take into account changes in circumstances and conditions which may afterwards take place; under their influence rates reasonable before the passage of the Act may possibly become unreasonable; they may become unreasonably high or unreasonably low: but that is equally true when rates are tested by putting them in force for a limited time, and if then found to be unreasonable, restraining the enforcement of the Act in the future. But these cases were heard at the Circuit more than a year and a half after the Act complained of was passed. That Act was passed on the 12th of April, 1893, and Mr. Justice Brewer's opinion was filed on the 12th of November, 1894, and the decree entered on the 23d of that month. This period was quite sufficient for any changes of conditions or circumstances to be developed or to manifest themselves; and whatever they were, they could have been shown upon this record. Such changes did take place: they were very radical and the fact was shown in the proofs. Accordingly, the cases present an Act for examination by the Court upon the test of actual facts and figures, which relate not only to the business during three years before its passage, but to the business during a year and a half afterwards. They are here not upon pleadings whose allegations are admitted by demurrer, as in

some other cases which have been here, but upon proofs; and proofs very simple, although involved in a mass of testimony, and singularly decisive.

III. I shall begin the inquiry whether House Roll 33, had it been put in force during any one of three years immediately preceding its passage, would have yielded any compensation to the Companies for their services; and I shall give figures about which there is no room for disagreement and which are least favorable to our contention. I propose to show not that the statutory rates would not have yielded to the Companies reasonable compensation for their services, but that they would not have yielded even cost of the business. I shall not complicate the inquiry by showing that these rates would have yielded nothing to apply on the interest of the debts of the Companies, or on the cost or value of the road, or any returns, by way of dividends or otherwise to the stockholders. I lay interest on bonds and mortgages and debts however evidenced and dividends to stockholders entirely out of view.

One word may be said of one of the witnesses who gives us the figures and facts upon which this first calculation is made. He is Mr. Dilworth. This gentleman is one of the defendants in each of these bills; he was impleaded because he is one of the three Secretaries of the Board of Transportation. The duties of the Secretaries are very active and important; in fact, they are the immediate administrators of the law. The statute providing for their appointment declares that they shall assist the Board in the performance of its duties. The nature of the assistance which they rendered appears from their action in a a particular case. In 1891 a very extensive and rigid investigation was made of the charges of the roads. The Secretaries prosecuted the inquiry in the first instance and recommended to the Board the action which they thought proper to be taken. The Board, reviewing the report, affirmed the findings of the Secretaries. (996.) From this instance may be inferred the

nature of the duty which, under the statute, the Secretaries discharged. These duties imply special knowledge of the matters which are here under examination. And this gentleman was one of the solicitors for the Board, and as such actively participated in these proceedings; his interest as a party was reinforced by his professional zeal. So that it is fair to assume that as a party skilled in the subjects of inquiry whatever fell from him was well considered and not unduly prejudicial to the defense. Each party repeatedly called him as a witness; and he testified, in behalf of one and the other, to many facts within his personal knowledge and to others of which he was bound to be informed in order to the discharge of his duties, and to still others as a competent expert. The Board was very careful to establish his competency as such and his knowledge of technical matters, as will be partially seen by his testimony on page 928 *et seq.* If the appellees sometimes felt that he gave way to the influence of his relations and did not always speak with perfect frankness, they are not disposed to question his general fairness. Certainly, it does not lie in the mouth of the appellants, after calling him as their witness and endorsing his veracity and competency, to disregard his statements.

1. The first important fact testified to by Mr. Dilworth is that House Roll 33 reduces the charges made by the companies twenty-nine and a half per cent; he says on pages 395 and 396:

"Q.—State whether or not you have compared the rates fixed in House Roll No. 33 with the tariff rates of the Railroad Companies, namely: The Union Pacific, The Burlington & Missouri, The Fremont Elkhorn & Missouri Valley, and the Missouri Pacific, for the purpose of ascertaining the reductions made by the Act known as House Roll No. 33? A.—I have so far as the local rates in force on those roads are concerned.

"Q.—What did you find the reductions to be? A.—They

are different on different classes. My recollection now is—I could go to the office and tell by referring to a memorandum—about 29½ or 30 per cent on an average on all the classes.

CROSS-EXAMINATION.

"Q.—Did you compare those as fixed by House Roll No. 33 with the rates of any of the adjoining states now in force? A.—I have made out tabulated statements of them.

"Q.—Do you remember how the local rates, as fixed by House Roll No. 33, compare with the local rates in the State of Iowa, for instance? A.—It is higher than the State of Iowa, but how much I do not remember.

"Q.—Then taking all the commodities that are named and fixed by the provisions of House Roll No. 33 it makes an average reduction on all the commodities of local rates of an average of 29 or 30 per cent? A.—Something like that.

"Q.—Is it greater or less? A.—My recollection is it is exactly 29½; some a little higher and some a little lower."

These figures 29½ have been accepted by both parties in all these discussions.

2. Mr. Dilworth showed another fact. Exhibit 20, on page 980, is a table prepared and presented by him, which, among various other interesting statistics, gives the "percentage of expenses to earnings of the several companies for the years ending June 30th, 1891, 1892, and 1893," as follows:

Name of Road.	*Percentage of Expenses to Earnings.*
1891—	
B. & M. R. R. R. in Nebraska	66.24
C. St. P. M. & O	70.78
F. E. & M. V	49.87
U. P. Ry	68.94
O. & R. V	120.26
St. J. & G. I	96.44
K. C. & O	99.54
1892—	
B. & M. R. R. R. in Nebraska	64.23
C. St. P. M. & O	65.96
F. E. & M. V	70.71
U. P. Ry. Co.	56.44

O. & R. V	93.12
St. J. & G. I	74.23
K. C. & O.	75.19
1893—	
B. & M. R. R. R. in Nebraska	65.51
C. St. P. M. & O	64.58
F. E. & M. V	53.66
U. P. Ry	58.51
O. & R. V	94.14
St. J. & G. I	62.05
K. C. & O	76.50

On page 1681, Mr. Dilworth says, further, that the percentage of operating expenses to earnings, on the table above mentioned, is upon all business; that which passes through the State; that which comes into the State from outside; and that which goes from the State to another; as well as that beginning and ending within the State; and that the operating expenses of local business, that is, business beginning and ending within the State, exceed operating expenses on all business, he presumes, over 10 per cent, and that it might run up to 20 per cent, probably might be higher than that. For this calculation we adopt his figures, about which there can be no dispute, and which are most unfavorable to us.

3. We have now three items, namely: first, the percentage of the reduction of the rates charged by the Companies imposed by the Act; secondly, the percentage of operating expenses of the gross earnings on all business; and thirdly, the per cent of extra cost of local business. The sum of these items is the per cent of charges against per cent of earnings. The maximum of the per cent of charges is one hundred, unless the business is an absolute loss: that is to say, if the per cent of charges is one hundred they equal the earnings. To illustrate, if the per cent of cost and reduction by the Act were one hundred there could be no profit—all the earnings under the statutory rates would be expended in doing the business, and nothing be left for compensation. If the per cent of cost and reduction by the Bill exceed one hundred, there would be a

loss, and if they fell short of one hundred a corresponding gain.

The arithmetic is simple: add 29.50 per cent reduction made by the Bill, the percentage of cost of all business as shown by the table on page 980, and 10 per cent for extra cost of local business, and deduct the sum of these three items from 100, or 100 from that sum, as the case may require, and the result will show whether, under the operation of the Act, the Companies would have realized enough or more than enough to cover their expenses. This matter may be thrown into a table:

Name of road.	Reductions by the bill.	Cost of doing all business.	Extra cost of local business.	Total
1891.				
B. & M.....	29.50	66.24	10	105.74
C. St. P. M. & O.	29.50	70.78	10	110.28
F. E. & M. V...	29.50	49.87	10	89.37
U. P. Ry.....	29.50	68.94	10	108.44
O. & R. V.....	29 50	120.26	10	159.76
St. J. & G. I....	29.50	96.44	10	135.94
K. C. & O.....	29.50	99.54	10	139.04
1892.				
B. & M..... ...	29.50	64.23	10	103.73
C. St. P. M. & O.	29.50	65.96	10	105.46
F. E. & M. V...	29.50	70.71	10	110.21
U. P. Ry.....	29.50	56.44	10	95.94
O. & R. V.....	29.50	93.12	10	132.62
St. J. & G. I....	29.50	74.23	10	113.73
K. C. & O.....	29.50	75.19	10	114.69
1893.				
B. & M.....	29.50	65.51	10	105.01
C. St. P. M. & O.	29.50	64.58	10	104.08
F. E. &. M. V...	29.50	53.66	10	93.16
U. P. Ry.....	29.50	58.51	10	98.01
O. &. R. V.....	29.50	94.14	10	133.64
St. J. & G. I....	29.50	62.05	10	101.55
K. C. & O.....	29.50	76.50	10	116.00

This table shows that not one of these roads would have realized the cost of its local business in the three years ending June 30, 1891, 1892 and 1893, had their rates been those fixed by House Roll 33, except the Fremont, Elkhorn & Missouri Valley in 1891 and in 1893, and the Union Pacific in 1892 and 1893; the Fremont Company would have earned 10.63 per cent in 1891, and in 1893 6.84 per cent; and the Union Pacific 4.06 in 1892, and 1.99 in 1893.

The same result may be reached by another process. Instead of taking percentages, we may take figures given by Mr. Dilworth in dollars and cents.

This gentleman stated (928) that he had made a computation and was prepared to state the amount in dollars and cents received by the respective Companies for freight hauled within the State of Nebraska, and also the amount of reduction in dollars and cents of such total amount received for freight hauled as would be brought about by the enforcement of the law in controversy in this suit. He also stated that he was prepared to speak to various other matters not material to the immediate subject of inquiry. He then verified the contents of a table which will be found on page 932 which covers the items to which he showed himself competent to speak. This table does not show on its face what period it covered, but on page 975 Mr. Dilworth says it was for the year ending June 30, 1892. He was then asked to make and file as part of his evidence a like statement for the years ending June 30, 1891 and 1893. He did so, and his table will be found at page 977.

In these tables he gives the "total amount received for tons carried locally" and "the total amount of reductions caused by House Roll No. 33," both in dollars and cents. It is easy to ascertain the extra cost of local business, for it is at least ten per cent above the cost of all business. If the sum of these items be compared with the earnings for tons carried locally, it will be demonstrated whether the rates fixed by the Act would, if in force in 1891, 1892 and 1893 have yielded cost of the business.

The computation may be illustrated by the case of the Union Pacific in 1892.

Mr. Dilworth gives "total amount received for tons carried locally" as $398,262; this sum is the gross earnings; and total amount of the reductions caused by House Roll 33 as $117,487. In the table on page 980 he shows that the percentage of expenses to earnings was 56.44, which is $224,779.-

07. The extra cost of local freight taken at 10 per cent was $39,826.20; which three items amount to $382,092.27; so that if from the earnings, $398,262, we deduct $382,092.27, we have net gain $16,169.73. These figures are subject to correction. Mr. Dilworth gives the percentage of expense to earnings as 56.44; Mr. VanKuran says that including taxes the per cent is 58. (619) It is evident that Dilworth did not take taxes into account. We shall show hereafter that taxes chargeable to local freight amount to $24,916.23. If that correction of Dilworth's figures in dollars and cents be made, they show that, had these statutory rates been in force in 1892, the Union Pacific would not have made cost of its local freight business.

The same process may be applied to the Burlington. In 1892 the total amount received for tons hauled locally was $1,237,884. This is gross earnings. The reductions caused by the bill were $365,175. The operating expenses were 64.23 per cent of the earnings, to which 10 per cent is to be added for extra cost of local business. 74.23 per cent of $1,237,884 is $918,881. The sum of the reduction $365,175, and operating expenses $918,881, is $1,284,056; deducting from that sum $1,237,884 gross earnings, shows a loss under the bill of $46,172.

The same calculation may be made for each Company every year. In order to present the whole at a glance the figures are thrown into the following table:

NAME OF ROAD.	Total Amount Received for Tons Carried Locally.	Total Amount of Reduction Caused by H. R. 33.	Expenses of all Business.	10 % for Extra Cost of Local Business.	Total Deductions.	Gain or Loss.
1891—						
B. & M.	1,066,871	314,726	706,695	106,687	1,128,108	-61.237
C. St. P. M. & O.	110,933	37,725	78,518	11,093	127,336	-16.403
F. E. & M. V.	348,408	102,780	173,751	34,840	311,371	+37.037
U. P.	278,211	82,072	191,798	27,821	301,691	-23.480
O. & R. V.	75,581	22,296	90,893	7,558	120,747	-45.166
St. J. & G. I.	21,817	6,436	21,040	2,181	29,657	- 7.840
K. C. & O.	6,732	1,985	6,751	673	9,359	- 2.627
1892—						
B. & M.	1,237,884	365,175	795,093	123,788	1,284,056	-46.172
C. St. P. M. & O.	123,033	36,294	81,152	12,303	129,749	- 6.716
F. E. & M. V.	336,714	99,310	238,090	33,671	371,071	-34.357
U. P.	398,262	117,487	224,779	39,826	382,092	+16.170
O. & R. V.	88,335	26,043	82,257	8,833	117,133	-28.798
St. J. & G. I.	31,004	8,836	23,014	3,100	34,950	- 3.946
K. C. & O.	6,630	1,889	4,985	663	7,537	- .907
1893—						
B. & M.	1,242,416	366,512	813,906	124,241	1,304,659	-62.243
C. St. P. M. & O.	142,542	42,049	92,053	14,254	148,356	- 5.814
F. E. & M. V.	424,437	125,208	227,752	42,443	395,403	+29.034
U. P.	413,714	122,045	242,064	41,371	405,480	+ 8.234
O. & R. V.	80,519	23,753	75,800	8,051	107,604	-27.085
St. J. & G. I.	33,802	9,971	20,974	3,380	34,325	- .523
K. C. & O.	9,445	2,786	7,225	944	10,955	- 1.510

These figures given us by one of the defendants and one of their solicitors, whose competency to speak is asserted and shown by them, and these calculations upon both percentages and dollars and cents, demonstrate in a very simple way what we set out to prove: that the rates limited by House Roll 33 would not, if in force in any one of three years before the passage of the Act have yielded returns which would have paid the cost of doing the business.

4. The result is confirmed by other figures in a very interesting way. Let those relating to the Burlington road be fi t presented.

Mr. Taylor had, when he testified, been Assistant Treasurer nineteen years and Auditor four years, (583,) and had been connected with all departments of the Company twenty-three years; practically ever since the road started at Plattsmouth, (597.) Beginning at page 590 of the record, Mr. Taylor gives an account of the earnings, expenses, mileage, etc., of the Company in 1892, from the first day of that year to the last, (601.) This is an interesting fact. Mr. Dilworth begins with the 1st of July of the year and ends on the 30th of June of the following year. Of course, covering distinct periods, the figures given by these two gentlemen cannot be the same, but if they substantially agree they confirm each other in a striking manner. Mr. Taylor presents a table which brings together so that they may be seen at a glance, all the matters of which he particularly speaks in the course of his testimony. That table will be found on page 593 and will be referred to for greater convenience. It shows that upon business of his road beginning and ending in Nebraska, the earnings were $1,853,-036.59 and the expenses $1,221,792.84. This, increased 10 per cent to allow extra cost of local business gives $1,343,972.12 and makes net earnings $509,064.47. Reductions of 29.50 per cent of the earnings caused by the bill are $546,645.78. This shows a loss of $37,581.31. Dilworth shows a loss of $46,172.

Mr. Randall, the Freight Auditor, when examined the first time, (542,) says that the earnings in 1892 were $1,853,036.59, which are the same figures Mr. Taylor gives; but he says the operating expenses were $972,183.50. This he, however, corrects on his second examination on page 630 and gives the same figures as Mr. Taylor, $1,221,792.84.

Thus, decisive confirmation of Mr. Dilworth's figures, so far as the Burlington is concerned, is found in those given by the Auditor and Freight Auditor of that road.

We turn now to the Union Pacific. Mr. VanKuran had been Freight Auditor of that Company seven years, and connected with that department twenty-two years. He says (618) that the freight earnings for the year ending June 30, 1893 in Nebraska were $4,313,204.46; and that he had not the figures as to the per cent of business which began and ended in Nebraska, but says it would be about 15 per cent of the whole. That would make earnings on local business $646,980.60. VanKuran further says that the expenses on all freight in Nebraska were $2,501,935, which, if we assume that the per cent of expenses is the same as earnings, gives $375,290. To this 10 per cent is to be added for extra cost of local freight, which is $37.529. The reductions of rates imposed by House Roll 33, being 29.50 per cent of the earnings, were $190,859. The reductions and cost together make $603,678. This shows a gain of $43,302.60.

The difference between Mr. Dilworth and Mr. VanKuran may be explained by the fact that Mr. VanKuran does not pretend to be exact in his statement that 15 per cent of all the business was local. But the result of his data shows a correspondence with that reached by Mr. Dilworth which carries conviction that the rates limited by the Act would have yielded little more than enough to cover cost of doing the business.

Thus far we have taken the lowest figure which Mr. Dilworth gives as the extra cost of local business. But this is but

half the truth. He says that perhaps the cost of local business exceeds that of all business more than 20 per cent. A calculation upon that basis would lead to a more correct result than that which we have taken. Even 20 per cent is not high enough. Mr. Albert Fink, a gentleman of very large experience in railroad management, who has given very close and exhaustive study to the problems which it presents and enjovs a national reputation unequaled among men of his profession, says: (659.)

"The through business is generally transacted in this way: You have a full train; you accumulate at the terminal enough freight to get a full train load, as heavy as the locomotive can pull, taxing the locomotive to its full capacity; that train starts from one end of a division and keeps on running without stopping, except when it meets other trains, until it gets to the end of the division; if those cars have been loaded, say with ten tons of freight each, which is a load I state merely for the sake of illustration, and they have twenty cars, they have carried twenty times ten tons; that is two hundred tons; the cost of running that train varies, but on the average it may be said for illustration's sake to be about a dollar a mile; then it has cost a hundred dollars to carry this two hundred tons—that is, fifty cents a ton; if it is carried one hundred miles, that is half a cent per ton per mile. Again, there comes in the question whether those cars have to go back empty, or whether they can be loaded at the other end; and that depends on so many different circumstances that you cannot foretell that; if they have to go back empty it costs twice as much, say one cent per ton per mile; the train costs nearly as much to carry it back empty as it costs to carry it forward; if you take local trains, the principal local business is a distributing business between stations, starting from some distributing point; the ends of the division are generally distributing points or places from which freight is distributed to intermediate points; that train may not have ten carloads to

carry; sometimes not five; that is altogether owing to the condition of that business or that trade. But suppose the most favorable case, that the train had twenty cars to start with; the cars on that train cannot be loaded like through cars, to the full capacity; they are loaded with a view of discharging freight at the various stations along the line. They must put on top, of course, the freight for the first station, so as to be handy to unload, and in that way they may have only half a load in a car; they would unload a certain amount of freight at each station; of course, it would not be the same at every station; that, again, depends upon the local conditions of the country; but by the time they have got to the end of the division they have unloaded most of the freight as they have passed over the road; suppose they do that, then what is the amount of the paying work they have done? They started out with half a load, and that half load they had dropped gradually as they approach the other end; that makes half of what they started with; that is, they carried one-fourth, one-fourth of two hundred tons, or fifty tons, over one hundred miles; now, the cost of that is about the same as a through train; perhaps it may be more, because they have to do switching along the line of the road, and shifting cars; but, merely for an approximation, take it that it costs the same — there will not be very much difference; the result is that the cost of carrying local freight is four times as much as the cost of through freight per ton, per mile; of course, they may take on a certain amount of freight on the road, and fill up the place of the other; to what extent that may be done you cannot tell beforehand; as a general rule, they run empty one way; upon this supposition you have the local business costing you three times as much per ton, per mile, as the through business; and yet, I have not made any allowance for keeping up the agencies on the line of the road; sometimes, on roads where there is very little business, the expense of the agent is a good deal for the small business done at the station; so I am sure, from

these considerations, that the local business is always much more expensive than the through business; there is an idea in the country that the local business has to pay for the through business, but I think the facts are the reverse; the through business has to pay for the local business."

Mr. Utt is another witness to the same point. He shows that he has had very extensive experience in the freight department of several roads, and has given the most careful study to the theories of freight charges. At the time he testified he was the Freight Agent of the Omaha Commercial Club, and a large part of his duties was the observation of rates. He says: (438.)

"In this State the Union Pacific has an immense through business over their main line; they haul several hundred cars of through freight daily through this State. This freight is not handled in and out of cars by the Union Pacific Company, it is through freight going beyond Ogden; the way-bills are made out at points beyond the Union Pacific termini. The Union Pacific freight is loaded at Chicago and east, and the cars sealed and sent through, and the Union Pacific rushes it through from Omaha to Ogden, at the rate of twenty to forty miles an hour. These cars are all heavily loaded, because they are to go long distances, and they will average heavy; the local freight trains run shorter distances and the freight is loaded light; the freight is loaded into the cars at and way-billed out of Omaha; it is received at Omaha, and checked out on the platform first, and a receipt given for it, and then loaded into cars to go to different towns in the State; the way-bills are made out, and the cars are put into local freight trains that go out to the different towns, and the cars are loaded light, because at the platform in Omaha they have to set different cars from different divisions, and the tonnage varies, but the cars have to go forward, no difference how small the business is. They haye to send the cars out every night, because the business is largely competitive, and they have to clean the

yards of these cars every night. When a local freight train is made up it has these light loads, and starts out with them, and passes through the country at the rate of eight miles an hour, and usually, when the car reaches the last point it has no freight in it at all; the average car of small local merchandise does not exceed five tons at the starting point, and is exhausted at the last point; therefore, at a middle point it does not contain over two and one-half tons, since the average load is not to exceed that. Local freight in Nebraska is composed almost entirely of small lots of goods, and live stock and hay; the distributing points are Omaha, Fremont, Lincoln and Nebraska City; outside of these four points there is practically little local business in the State; the local freight goes out on the road on a schedule time of ten miles an hour, and spends more time in switching at stations than is spent running between stations; when they arrive at a station they unload merchandise, check it out of the cars onto the platform, then they set in cars of lumber, or cars of coal, and switch out empties, and set cars to elevators, and keep out of the way of through freight trains, and sometimes consume several hours in switching; frequently take cars and switch them several times, changing location of cars and setting cars out, and performing the regular train services at stations. The result is local freight trains as a rule run late, there is scarcely a day in the week where a local train is on time; a local freight train requires three brakemen, and a through freight two; the average time of local freight is eight miles an hour, and twenty miles for through freight. When the local train starts out it is an ordinary train of merchandise, with an average of five tons to each car; it distributes this, and when it reaches its destination has empty cars, and the average tonnage of local trains is not to exceed one-fourth of the tonnage of through trains. As they come back they are loaded with empty cars and live stock. A train starting from Grand Island would expect to reach Omaha with live stock and empties; they

would pick up one car at one station, two at another, and two at another, and get in here with twenty-five cars of stock; they have to leave the empties at the station and then take out the stock, and then they have to set these empty cars to elevators, and switch cars of lumber to lumber yards and cars of coal to coal yards. The freight train is entirely under the control of the local agent at the station, and must do what he says in handling cars. A through freight train running over the Union Pacific Railroad is always filled to its utmost capacity with heavy loads; they can always command full trains, because there is a low class of freight that does not require promptness and dispatch that can be used to fill up trains. The consumption of coal on a local train is greater than on through trains, and the wear and tear is greater than it is on through freight, because the principal expense occurs in stopping and starting, and a local freight train may switch forty times at one station, while a through train from Omaha to Grand Island would run through without a single stop. My judgment is that local freight in Nebraska is quite different from local freight in Iowa, for the reason that the cars of local freight that are handled locally in this state comprise a class of business that are loaded lightly; live stock on an average is 19,000 pounds; the average car of local merchandise has two and one-half tons, when you consider that they start out with five tons and stop without any load. On hay they are never able to load to exceed eight tons; in Iowa the largest items of local business is lumber, coal and grain; any average carload of coal has twenty tons; the average carload of lumber has fifteen tons; the average carload of grain is seventeen and one-half tons. The average tonnage on through business in the State of Nebraska is fifteen tons to the car; the average tonnage on local business in the State of Nebraska does not exceed seven tons to the car. There is another disability connected with the local business in this State as compared with Iowa and Illinois, and that is the question of empty cars. In

hauling live stock in Iowa or Illinois, the stock car can be loaded with coal or lumber with a return load. In this State the stock car has got to be returned empty from South Omaha, or Nebraska City, or Lincoln, because there is no coal or lumber to load into it. The reason is the coal and lumber in this State is all handled on the inter-state rate; the lumber that comes into Nebraska comes over the Missouri Pacific road and south; comes in foreign cars. Consider, again, that a carload of hogs and cattle, the car itself weighs 20,000 and the freight only 19,000 pounds, it is a considerable item. In the State of Iowa consider that a car would be loaded with coal and lumber instead of being hauled back empty. Again, coal cars are shipped from Iowa points to Mississippi River points and are loaded back with lumber. You will see in Iowa coal cars loaded with lumber; you will not see that here, because there is no lumber to fill the car with. A car in Iowa is loaded with coal or lumber, and in Nebraska is hauled back the entire distance empty. In connection with the coal business in this State there is another item, and that is particularly on the local trains, is the amount of fuel. The fuel that the Missouri Pacific uses is hauled from points in southern Missouri, very largely from Pittsburg and Rich Hill; the average haul on the Hastings branch is 475 miles from the coal mine; to Omaha the distance is 350 miles from the coal mine. The coal used on the Elkhorn is hauled from What Cheer and Muchachinock, Iowa, to the Missouri River, a distance of 300 miles, and from points on the Elkhorn to Nebraska points, a distance of 500 miles. The coal on the Union Pacific is brought 700 miles from Rock Springs. The coal used on the Grand Island Road in Nebraska comes from Rock Springs; the coal used on the Chicago & Rock Island in Nebraska comes from Des Moines and east; it is fair to assume that there is an average haul of 300 miles on coal for consumption in the State of Nebraska in excess of what the haul is in Iowa and Illinois, because there is not a railroad in Illinois, scarcely,

but what has coal mines on its entire length. In the State of Iowa the Wabash into Des Moines, the C. B. & Q., the Chicago & North-Western, the Chicago & Rock Island, the Illinois Central, the Chicago & Great Western, the Central of Iowa, the Burlington Cedar Rapids & Northern, and the Mason City & Ft. Dodge, all have extensive coal lands along their lines. Based on these figures, and assuming that there is the additional haul of 300 miles, and it costs half a cent per mile to haul the coal, there is a disability of $1.50 a ton to a railroad in Nebraska as against a railroad in Iowa or Illinois, or Missouri; Missouri also has plenty of coal mines.

"Another feature of the coal business, increasing the cost to the Nebraska road—several small features, are these: That where coal is hauled a long distance there is a considerable percentage of shrinkage by evaporation, and by the coal being blown away, and it is lump coal, and coal is high; and there is always, at all stations, a large amount of pilfering. Again, the coal that is shipped in Nebraska, outside of the Rock Springs coal, the longer it is in transit, or in store, the less units of heat it has, because any exposure to the air makes a slow combustion continually take place, and after it has been exposed a short time it goes to pieces. The steam coal loses from twenty-five per cent of its units of heat in thirty days, and, if left in a building two months, it takes fire by spontaneous combustion, indicating that there is a disability to roads in Nebraska on account of the slow combustion taking place in coal the longer it is in transit, or in a building; also the railroads are compelled to keep more coal in store in Nebraska then they are in Iowa or Illinois; they have to provide for emergencies; there are frequent snow blizzard, or washouts, that the coal supply being too far away from the point of use, that unless there is considerable coal on hand they may not be able to run their trains. Therefore, there is not only a loss by virtue of the decrease in the value of the coal, but also, there is more money invested in the additional amount; also, there

is a long haul on the empty coal cars, so that in estimating that it costs $1.50 a ton more to the railroads in Nebraska for their coal than it does in the neighboring States east of us, the estimate is certainly not too high. The roads in this State use about 700,000 tons of coal annually.

"Q.—In that connection, let me call your attention to the volume of the business in the two States, comparatively, and to the population per mile of railroad; what have you to say to that? A.—That is a fact. In this State there are about one hundred and ninety people to the mile of railroad; in Iowa, two hundred and thirty, and in Illinois, three hundred and thirty. Now, the earnings of the railroads in Iowa are usually in excess of the earnings in Nebraska; take, for example, the North-Western System; they earn in round numbers, in Iowa, on the North-Western Railroad, $5,000 per mile, and the Fremont Elkhorn & Missouri Valley earns $2,200 per mile." (438–444.)

Mr. Randall says, (544–547.)

"Take for instance, the haul between Omaha and Lincoln; at both places we have expensive terminals, have of necessity; well, the terminal expenses on a short haul are just as much as they would be on a long haul."

"Q.—Explain how that is? A.—The original cost of the terminals, for one thing—then the operating expenses of the terminals; for instance, switch engines, and their crews, yard men, warehouse men, clerks, and agents; it costs just as much to make a way bill producing 25 cents as it does to make a way bill producing $25. It costs as much to switch a car at the terminal which produces $10 as a car that produces $100; then take merchandise on short hauls, that has all got to be loaded so that it can be delivered most conveniently, and at the least cost; whereas, long hauls go through without practically any stoppages, the short-haul fellow has got to stop at each station and unload and load freight, whereas, the through-haul has a straight shoot, without any stop-

ing except from necessity, such as for water or to change engines; there is no comparison between the expenses of a long haul and a short haul; it can be very readily understood if you make a comparison between them—a train loaded with short-haul freight, as compared with a train loaded with long-haul freight, the train doing the short-haul business will occupy three times as much time on the road as the long-haul train; the long-haul train, we will say, goes clear through from the Missouri River to Denver; the short-haul train has got to stop at all the different stations to do its business; it has got to do its switching, has got to set out a car, and take up a car, deliver merchandise and take up merchandise; the cost, therefore, I think, would be reasonably double the long haul.

"Q.—What do you say to the item of time? A.—The item of time, that comes in on the pay rolls; the men will occupy a greater time, a great deal longer time, in delivering short hauls than they do in delivering long hauls.

"Q.—What is the average time of a freight train doing local business in this State on the road? A.—Well, I didn't look into that, but I should say ten miles an hour; eight to ten miles an hour on a short haul.

"Q.—What is it on a long haul? A.—Fifteen miles per hour, but there is not very much of it.

"Q.—Well, I wish you would explain the matter of doing local interstate business, with reference to carriage, cost, earnings and employees. A.—Practically, there is no difference; it is all done on the same plan; a consignment of merchandise going from Omaha to Hastings, Nebraska, is treated identically the same as a consignment going to San Francisco; that is, it passes through the freight house; it is handled there side by side with the local business; the Hastings consignment and the San Francisco consignment are handled side by side, probably even upon the same truck, and carried out on the platform on the same truck; the chances are, it is put into

the same train; when that train gets along to Ashland, Nebraska, a consignment from there to San Francisco might possibly be put into the same car with a consignment from Hastings. If it is a carload, the same argument applies. The car has got to be switched to a place to be loaded, no matter whether it is going to Lincoln, Nebraska, or to San Francisco; the switch engineer and crew know no difference, and the yard men know no difference; it costs them as much time and as much labor to set out a car to be loaded for Lincoln as for San Francisco; when that car is ready to go, it costs just as much to put that car into the train, whether bound for Lincoln or for San Francisco — just the same — there is no difference; then, with regard to time, as a general thing local and through freight are carried on the same trains; the only exception to that is when we have enough through business to make up a through train; when we do, of course we take advantage of that, and send the train through; when we do not, as is generally the case, we have got to send them in the same train; and for strictly local business, for instance, picking up business going west, for the Pacific coast, or business going east for Chicago or points east of that, at these local stations, consignments for Omaha and Chicago would probably be put in identically the same car, side by side, and carried to the Missouri River side by side, because we could not possibly get a carload at each place; therefore, we have got to carry them in the same car until we get to a distributing point, or collecting point, so we can make through carloads of them. But, within the State of Nebraska, local business and through business are done under identically the same conditions and at the same expense. Now, then, with reference to the time: it takes a great deal longer time to do local business than it takes to do through business on the road, because a local train, as I previously explained, has got to stop every eight or ten miles, it has got to switch to set out its cars, either for loading or unloading, and has got to run

its way freight cars to the platform so that the warehouse freight can be unloaded into the warehouse, whereas there is no such work entailed on the through business."

This testimony, which is uncontradicted, unqualified, and not minimized by any explanation, justifies an allowance, not of ten or twenty, but of fifty, and even a larger per cent for the extra cost of local business. If the calculation were based on these estimates, the result would show an enormous loss by the Companies, had they from July 1, 1890, to December, 1893, undertaken to carry traffic under the tariff of House Roll 33.

IV. Thus far, the inquiry has been whether the rates limited in House Roll 33 would have covered the expense of the business. But that is not the true question. Account must be taken of other matters as well as operating expenses. It is just as necessary that the Companies should earn enough to cover them as cost of the business. Take the case of the Union Pacific.

The Union Pacific Railroad Company was incorporated by Act of Congress in 1862. (12 St. 489.) The fifth section of the charter provides for a loan of government bonds, and authorizes the Secretary of the Treasury to take possession of the road with all its rights, functions, immunities and appurtenances whenever the Company fails or refuses, upon demand of the Secretary of the Treasury, to redeem any part of them. In 1864 an amendatory act (13 St. 356) was passed authorizing the Company to issue its first-mortgage bonds upon the road to an amount equal to that of the government subsidy bonds and postponing the government lien to that of the mortgage. In 1878 what is known as the "Thurman Act" (20 St. 56) was passed, which provides for a sinking fund into which the Government is required to pay 25 per cent of its net earnings, and that failure to do so "shall operate as a forfeiture of all the rights, privileges, grants and franchises derived or obtained by it from the United States," and devolves upon the Attorney

General the duty of enforcing such forfeiture by judicial process. Under the stress of this Act in 1889 the Company paid into the Treasury of the United States, $1,140,379.04; in 1890, $1,041,153.43; in 1891, $1,278,488.82; in 1892, $1,338,044.37, (710.) These high and severe sanctions proceed not from any convention between the Government and the Company, but from the sovereign will of the United States. The burden laid upon the Company and its property was imposed by the highest authority and by behests beyond reach or question by any party. The life of the Company depended upon implicit obedience, and it is beyond the power of a State to defeat the interests or the sovereign will of the United States by wresting from the Company its resources, so that it will be unable to meet its duties. As Mr. Chief Justice Waite said in the Commission Cases, "the power of a State to regulate rates is not a power to destroy the Company."

This is equally true of the first-mortgage bonds; all the solicitude of Congress in respect of the government debt was vain and useless, unless protected against a forfeiture under the prior lien, and such forfeiture is inevitable if the resources of the Company are dried up. Nor are the direct interests of the Government alone involved; the holders of the first-mortgage bonds have upon the plainest principles of common justice, the right to the payment of their securities and interest thereon as the same come due; and those rights are beyond the reach of the State. The Government expressly authorized the bonds and the mortgage securing the same and gave them a priority over its own lien. It put the stamp of its approval upon them: relying on such endorsement, parties were drawn into advancing their money upon these securities. It cannot be tolerated that the State shall disable the Company to perform its obligations. If it may do so, repudiation in any form is easily justified.

1. At this point a problem somewhat complicated is presented. As the burden of these charges is upon all the lines of the

Company, and is to be paid out of its earnings on all classes of business, of which the business of transporting freight between points both of which are within the State is a fraction, it is necessary to ascertain what that fraction is. The process of reaching it is somewhat protracted, but each step is simple.

In the first place, the roads liable to the requirements of the "Thurman Act" are one between Omaha and Ogden, and one between Kansas City and Denver. Mr. Mink says that from eighty to eighty-five per cent of the whole sum paid into the Treasury of the United States was on account of the Omaha and Ogden line. Taking the lowest per cent given by him in order to avoid all discussion, eighty per cent of the whole sum paid is to be ascertained.

In the second place, the Omaha and Ogden road is 1,034.49 miles long, and only 467 miles are in Nebraska. As the inquiry is with reference to the part of the road in the State its share of the whole line must be found. If we divide the whole sum paid by the number of miles of the whole road, we have the charge per mile; and if we multiply that by the number of miles in the State, we have what the road in Nebraska is to contribute.

In the third place, this sum is to be paid out of the earnings on all local business; which is both freight and passenger traffic: as we are concerned only with the former its share of the charge must be separated from that of the latter. The testimony shows that expenses are distributed between them by assigning seventy per cent to freight and thirty to passenger business; so that seventy per cent of the sum reached by the former calculation is the share of the charge which freight is to bear, (592, 620.)

In the fourth place, freight business in the State consists of traffic going through the State, that coming into the State from other States, that going from the State to other States, all which are interstate traffic, and, lastly, business originating at points within the State and destined to points also within the

State, called local traffic. As we are concerned only with the latter, we have to ascertain what is its share of the freight business. This brings us to the sum which local freight business is to contribute to the charge laid upon the Company by the Thurman Act.

By these processes we will ascertain the share of the payment made into the treasury of the United States under the Thurman Act by the Company in 1892 which local freight should contribute. Mr. Mink says the whole amount was $1,338,-044.37, and that from 80 to 85 per cent of this sum was on account of the road from Omaha to Ogden; that is, $1,070,-435.44, which is the sum attributable to the Omaha line. That line is 1,034.49 miles long; dividing the whole sum to be paid by the mileage gives $1,034.74 per mile. The road in Nebraska is 467 miles long; multiplying the charge per mile by the number of miles in the State gives as the amount chargeable to that road annually, $483,223.58; 70 per cent of the whole business being for freight, gives $338,256.45.

Mr. VanKuran says that local freight was about 15 per cent of all the freight earnings, which is $50,738.46. This, then, is what local freight should contribute to the payment of the requirements of the Thurman Act.

The same processes applied to the first mortgage are as follows:

The amount due thereon is $27,229,000, and draws 6 per cent annual interest, which is $1,633,740. This sum, divided by 1,034.49, the mileage of the whole road, and multiplied by 467, the mileage in Nebraska, gives the amount chargeable against the Nebraska road as $737,519.09; 70 per cent of this sum for freight, is $516,264, and local freight being 15 per cent thereof, we have $77,439 as the sum which freight is to contribute to the payment of the requirements of the Thurman Act.

Taxes are to be dealt with in the same way, but we have the amount paid in Nebraska, so that no apportionment need be

made in respect of mileage. The amount paid in Nebraska was $237,297.58, 70 per cent of which for freight is $116,108.30, and 15 per cent of that sum being the share of local freight is $24,916.23. That is what local freight should contribute to the payment of taxes.

Mr. Dilworth says that the reductions caused by the bill were $117,487.00, and that the operating expenses 56.44 per cent of the earnings, which, increased 10 per cent in order to cover the extra expense of local business, come to $264,605.00. Putting these figures together, they are as follows:

Requirements of the Thurman Act	$50,738.46
Interest on first mortgage	77,439.00
Taxes	24,916.23
Reductions by the bill	117,487.00
Operating expenses	264,605.00
Total charges against local freight business	$535,185.69

Mr. Dilworth's table on page 932 shows that the Company received for tons hauled locally, $398,262.00, which deducted from the charges leaves a balance against the business of $137,685.63.

In this calculation every possible concession is made to the appellants. Ten per cent is taken as the extra cost of local freight business, when, according to Mr. Dilworth, 20 per cent might reasonably be charged, and according to Mr. Fink, Mr. Utt and Mr. Randall, 50 per cent is justified. Mr. Mink says that the Company made several other mortgages on its road to secure large debts. No account is taken of them in the above calculation. They have been omitted because in respect of some of them there is difficulty in ascertaining the part chargeable to the road in Nebraska, and also because they are the subject here of animadversion, and with the multitude of figures before us it seems worth while to take account of only what is beyond question.

We will next take the case of the Burlington, following it through the same processes. Mr. Taylor says that the mortgages on that road amount to $45,268,992.80. The interest

thereon, he says, was $2,224,171.17; the amount of sinking fund charges called for by the mortgages was $304,744.83, making the total fixed charges annually, $2,528,916. This is the sum which is to be reduced to local freight; 70 per cent of it for freight is $1,770,241.20; Mr. Taylor also says that local freight is 21.27 of all the freight; 21.27 per cent of $1,770,241.20 for local freight is $376,530.30. This is the share of annual fixed charges which the local freight must pay. Operating expenses, which are 64.23 per cent for all business, and 10 per cent for extra cost of local business, were $918,881. Taxes paid in Nebraska for 1892 were $503,971.04, of which 70 per cent for freight is $352,744.72; and 21.27 for local freight is $75,028.80; that is the sum chargeable for taxes. The reductions caused by the bill, Dilworth says, were $365,175.00. From these sums is to be deducted the total amount received for tons hauled locally. The figures put together are as follows:

Interest on mortgages	$376,530.30
Taxes	75,028.80
Operating expenses	918,881.00
Reductions by the bill	365,175.00
Total charges against local freight	$1,735,615.10
Deduct total amount received for tons hauled locally, given by Mr. Dilworth in his table on page 932	1,237,884.00
Balance against the business	$497,731.10

The mortgages on the Burlington road may not be fortified by sanctions of as positive a character as the first mortgage and calls of the Thurman Act on the Union Pacific; they were nevertheless authorized by the statutes of the State, and the bonds secured by them were put upon the market with that endorsement. After they had been sold in the market and their proceeds applied to the construction of the road, for the State to disable the Company to pay them by raiding its treasury, shocks the sense of justice of every honest man. These debts are not of course debts of the State which it must pay or be denounced as a repudiator, but if it makes their payment impossible it is as guilty as if it refused to pay its own debts.

Nor is this all. If the State disables a Company to pay debts which it has sanctioned, it destroys the equity of the stockholders in the corporate estate; that estate is not worth the paper on which the certificates of stock are printed. The Act is practically confiscation. This Court, while saying that the Legislature may limit the charges which railroads may exact for the carriage of persons and goods, has said that this power is restrained by the provisions of the Constitution protecting property. A statute limiting rates so that the Company cannot pay interest on its mortgage debts when they are less than half the cost of the property, comes within the provision of the Constitution.

We follow the same processes with the business of the Fremont Elkhorn & Missouri Valley Company.

No witness gives the proportion of local and all business, but we are not without the means of ascertaining it. Mr. Dilworth's table on page 932 gives the amount received from tons hauled locally, $336,714, and the amount received from freight hauled in Nebraska including through and local, $1,495,468, from which we find that local freight is 24.50 per cent of all freight.

Mr. Kirkman, the Comptroller and Treasurer of the Company, says (621) that it paid $212,824.59 taxes of which freight should pay 70 per cent, which is $148,977.21, and local freight 24.50 per cent; that is, $36,499.41. That is what local freight should contribute to taxes.

Mr. Kirkman also says that $7,725,000 are outstanding on the Company's consolidated mortgage which draws 6 per cent which is $463,500, and that $10,675,000 are outstanding on a collateral trust which draws 4 per cent, which is $427,000, making interest charges $890,500. Seventy per cent of this sum chargeable to freight, is $623,350; 24.50 per cent chargeable to local freight, is $152,720.75.

The operating expenses shown by the table on page 658 to

be 70.71 per cent of the earnings, with 10 per cent added for extra cost of local freight, are $271,761.

Reductions caused by the bill, shown by the table on page 932, are $99,310. Putting these figures together, they are as follows:

Taxes	$36,499.41
Interest	152,720.75
Operating expenses	271.761.00
Reductions caused by the bill	99,310.00
Total charges against local freight	$560,291.16
Deduct total amount received for tons hauled locally, shown by table, page 932	336,714.00
Loss	$223,577.16

The taxes for 1892 paid by the Chicago St. Paul Minneapolis & Omaha Company were $58,678 (1549); 70 per cent is $41,074.60. Total amount received by this Company for tons hauled locally was $123,033, and the "amount received by it for freight hauled in Nebraska, including through and local," was $472,051; so that the per cent of the former was $26\frac{1}{16}$ per cent or $15,292.95, which is what local freight should pay for taxes. This Company has 270 miles in the State which is mortgaged for $15,000 a mile, interest on which is six per cent or $243,000; 70 per cent is $170,100, and $26\frac{1}{16}$ per cent of that sum is $44,332.31, which is to be contributed by local freight. Operating expenses with 10 per cent added for extra cost of local freight were 75.96 per cent of earnings, which gives $93,455. Reductions caused by the bill were $36,294.

These sums put together are as follows:

Taxes to be paid by local freight	$15,292.95
Interest to be paid by local freight	44,332.31
Operating expenses of local freight	93.455.00
Reduction caused by the bill	36,294.00
Total charges against local freight	$189,374.26
Deduct amount received for tons hauled locally	123,033.00
Loss sustained by the Company	$66,341.26

As in 1892 the earnings of the roads were much larger than in 1891 and 1893, while their expenses were in the case of some of them larger and in that of others not much less, it

would be only a tedious repetition to follow these processes through their business. And as the other roads, the Omaha & Republican Valley, the St. Joseph & Grand Island and the Omaha & Kansas City, did not nearly earn their expenses, it is quite useless to subject them to the same calculations.

The figures which we have presented and which are not questioned by any evidence, and the very simple calculations made from them, demonstrate mathematically that had the rates limited in House Roll 33 been in force in 1891 or 1892 or 1893, no one of the Companies would have earned what it expended in doing the business except two of them in exceptional years. No one of them would have earned cost and its fixed charges.

2. But the testimony goes further. The Act was passed on the 12th of April, 1893. Our information is not limited by that date; it extends to the close of that year.

Mr. Young, the auditor of the Union Pacific, tells us (1530) that the number of tons hauled one mile in Nebraska was, in the last six months of 1892, 527,888,863, and in the last six months of 1893, 266,596,469, being a decrease of about fifty per cent.

Mr. Buckingham, the superintendent of car service of the same Company, says (1336) that in the last six months of 1892 loaded cars hauled were 32,793,438, while in the same period of 1893 only 28,606,999 were hauled.

Mr. Randall, at page 543, says that 1892 was "away ahead of anything we ever saw for traffic, away ahead." "All these computations are made on a good year, not on a poor year. In 1893 we practically have not had any fall trade. When I say fall trade I mean such as grain or staples; the comparison was very poor; 1891 was not to be compared with 1892; 1891, standing by itself, was a fairly good year, but was not up to 1892; 1890 was worse than 1891."

Mr. Taylor, audtior of the Burlington, says the earnings of

his Company in the last six months of 1892 from freight were $4,860,316.77, and in the same period of 1893 were $3,326,961.51—a reduction of about 25 per cent, (1639.)

While we have no comparison of the business of other Companies for the last six months of 1892 and the same period of 1893, we may reasonably infer that what reduced the business of the Burlington and Union Pacific, operated just as disastrously on them. And it is matter of common knowledge that so far from these conditions improving after January, 1894, they have been going from bad to worse. The Union Pacific is now going through bankruptcy, and the other Companies are sustaining themselves only by covering the losses of local business by the earnings on through business. Had this Act gone into effect when it was passed, not one of them could have survived; every one of them would have been added to the appalling list of roads in the hands of receivers.

When the case was, in 1895, heard at the Circuit, Mr. Justice Brewer had before him proofs that the conditions of the roads at that time did not justify the reductions of rates made by the Act, and now when it is heard here, the same is true. Everything was at that time before the Circuit Court, and is now before this Court, which could have been presented upon bills filed eighteen months after the passage of the Act or at this time. So that there is no room for saying that the rates should be put in force and tried, before suits were brought.

V. We proceed now to an examination of the contention of the appellants. Much that is said in their support has nothing whatever to do with the questions here. The question is whether the rates limited in House Roll 33 for carriage of property between points both of which are within the State, would, if put in force, yield to companies for that service reasonable compensation. No assistance in answering that question is found in the fact,

1—That an enormous sum is annually charged by the rail-

roads of the United States for the carriage of freight or by the railroads of Nebraska for freight carried within the State; or

2—That in a number of States, of which Nebraska is one, the earnings of the railroads therein are 1.360 cents per ton per mile, and the average cost is .713; or

3—That the reduction of the earnings of the Companies on all their business in eight or ten States proposed to be made by an Act relating to that which begins and ends in the State is only from 1.5 per cent to 4.5 per cent; or

4—That the rates charged by the Companies are higher than they are in adjoining States, and higher than they are from the Missouri River to Chicago; or

5—That railroad men proceed upon a false theory in making rates; or

6—That railroads are guilty of discrimination; or

7—That the Companies have received aid from the Government and municipalities; or

8—That the Nebraska Companies are capitalized at much more than their actual value or cost.

We pass these various and irrelevant matters which have been made the ground for discursive declamation.

In an appendix to this brief it is shown that the facts are not as stated by the appellants on any of these irrelevant points.

VI. We shall subject the figures, calculations and inferences of the appellants to examination, and show that they do not meet those presented by us.

1. Two preliminary objections are made to these bills. The question is asked, "How the Court assumes that reduction of rates would reduce income?" The appellants called Mr. Dilworth to speak on this subject. He says he thinks that it will not be disputed that a "reduction of rates will increase tonnage," and illustrates this notion by the case of a reduction of the rate on hay shipped by the Elkhorn road to Omaha

of from 25 to 50 per cent and an increase of tonnage of 400 per cent.

It will not escape notice that all that Mr. Dilworth is at great pains to prove is that decrease of rates causes increase of tonnage; tonnage is what he speaks of all the time, and not earnings; he does not say that decrease of rates and increase of earnings go together. There is a wide difference between tonnage and earnings. With rates which do not yield cost, the more tonnage the less earnings. In the case stated, decrease of rates and increase of tonnage went together, but that does not show that one caused the other. We know that other conditions tend to increase tonnage. When the changes of rates and tonnage took place, Omaha, (which was the hay market,) was growing very rapidly, so that the demand for hay was very greatly increased. The fact is, that increase of tonnage is accounted for not by the fact that it was coincident with decrease of rates, but by the increase of demand for hay.

And the same comment may be made upon the instance of the business in Iowa. What Mr. Dilworth says on the subject is very indefinite and unsatisfactory; it is certain that he did not know enough about it to justify an opinion on his part that reduction of rates there had increased tonnage, even if that proved anything. Increase of tonnage, and of earnings also, is to be accounted for by the growth of the State in population, wealth and business.

We have said that Mr. Dilworth does not express himself about decrease of rates increasing business. He was asked his opinion whether the railroads would make as much money by enforcing the statutory rates as by maintaining the old ones, to which he answered that history tells us they probably would, and he thinks the roads would clean up as much money as they do now. That testimony is too indefinite to be of any value. It is hardly worth mentioning. But before and since House Roll 33 was passed, the trouble has been that there

was no business to be stimulated by reduced rates. The crops failed, that was one reason for there being no freight to ship. The business of the whole western country came to a standstill; there was no demand for merchandise for shipment; that was another reason; so that had the rates been reduced, as long as there was no freight to be transported, business would not have come. Want of freight to be hauled has been the trouble, not the rates charged for hauling it. The reduction of passenger rates during the World's Fair is not an apt illustration. Many people will travel if they can get reduced rates who will not do so at normal rates. But reduction of rates for the carriage of property will not stimulate its transportation if there is no demand for the property. Besides, while the roads carried more people to the Fair when they reduced their rates, they made less money.

2. Another objection to these Bills is that it is not shown that the expenses which enter into our calculations were just, reasonable and proper.

Mr. Taylor says, at page 612, that his "judgment is that the expenses of his Company on account of the salaries of officers and clerks, and general expenses, are just as economically conducted as it is possible to conduct them, and often times we run to the danger line in many cases; in many cases we are paying salaries for services which only get very inefficient and poor help—too poor to conduct the business properly,"—and thinks that without exception, the expenses of his road are lower than other analogous roads; that in the majority of items that is true without any doubt; in some, as in the cost of coal, they probably exceed some of the others."

Mr. VanKuran says, at page 625, that the Union Pacific is operated with the very greatest economy; the salaries are low. He says: "Take my department; I have in my department from one hundred to one hundred and fifty men, and my pay-roll, including my own salary, and all connected with

the department, will average less than $60.00 per man per month."

Mr. Utt, on page 1638, says: "All I could state about that is that I have had long experience in general offices of railroads, and I know the salaries that are being paid, which is the principal expense of conducting the B. & M. and Elkhorn in this town; I do not know so much about the Union Pacific, but I do not consider the expenses excessive; but, on the other hand, the management is very economical in connection with general offices. I consider, in a general way, that it is economical; I do not think there is any more economical railroad management in the country than there is on the Elkhorn and the B. & M. I am satisfied that is so. I do not know so much about the Union Pacific, but I know considerable about those two roads. I have known the officers for a great many years; I knew Mr. Burt in Iowa, on the railroad there; I knew Mr. Holdrege when he commenced work in Plattsmouth, and I have known all the officers of the Company for a great many years."

This proof is general, but it is not contradicted or qualified, and is sufficient for the purpose.

3. From these two preliminary objections to these bills, we pass to the figures and the computations thereon by which the attempt is made to show that the roads are making enormous profits which may justly be reduced twenty-nine and a half per cent. We are met at the outset by the statement that the roads charge a little over forty per cent more than the Act allows, and this statement is reiterated and taken as the premise of many contentions. It seems worth while to show that the fact is not proved. Even if it were, it would not prove that the reduction is justified; for 29.50 per cent taken from, say 40.50, might not leave cost and a fair profit. If the present rates only yield cost and a fair profit, any reduction must be unjust. Before the reduction is justified it must be proved

that the present rates yield an exorbitant profit. The calculation adopted to prove the alleged fact that the Companies are charging forty per cent more than House Roll 33 allows is on its face fallacious. It is this: it is said that the present rate being $1.00, and the statutory rate 70½ cents, a reduction is shown of over 40 per cent. That does not follow at all; the reduction is only 29½ cents. Let the process be stated; the question is what per cent of $1.00 is 29½? This is found by dividing 29.50 by 1.00, thus:

```
1.00 ) 29.50 ( .295
       20.0
       ----
        9.50
        9.00
        ----
         .500
         .500
         ----
```

This shows that the reduction is 29.50 per cent; just what appears by subtracting 70½ from 100. If it is right to assume the present rate to be $1.00, and the reduced rate 70½, the reduction must be not a fraction over 40 but 29½ per cent.

This is a fair example of the reasoning by which the defense is supported.

Take another calculation. It is said that in 1892 the Burlington earned on local freight $1,853,036.59, and that to ascertain what it would have earned had it adopted the statutory rates we should divide that amount by 1.295, which gives $1,430,916.99. The process is vicious: the proper one is to find 29.50 per cent of $1,853,036.59. To get 29.50 per cent of $1,853,036.59 we divide it by 1.00, then multiply that by 29.50, which gives $546,645.79. That sum subtracted from the earnings under present rates gives what would have been earned under the statutory rates, that is, $1,306,390.80, instead of $1,430,916.99.

Deducting from our figures the cost, $1,221,742.84, leaves net $84,647.96, whereas the other process gives net $209,174.15.

That ours is the correct process appears from a simple illus-

tration. A farmer had 500 sheep and lost 20 per cent. of them; how many remained? This is the correct process:

Multiply the original number	500	
by the rate of loss	.20	
and we have the loss	100.00	
From the original number		500
Deduct the loss		100
The number left is		400

The other process divides the original number by 1 plus the rate of loss, 20, thus:

```
120 ) 500 ( 416
      480
      ---
       200
       120
       ---
        800
        720
        ---
```

According to that the farmer would have 416 remaining after losing 100. By that process it would appear that after a loss of 20 per cent, or one-fifth, which is 100, there remain 416. In that way the Burlington appears to have $124,526.19 more earnings than can be accounted for.

The computation upon the figures of the Union Pacific is equally unsound. It is said that "the decrease on gross earnings on freight purely local" is $142,688.99, as shown by Van-Kuran's figures and calculations thereon.

This sum is reached by the following process:

$4,313,204.46 is taken as the freight earnings in the State, of which local freight was 15 per cent, which is found by the same erroneous method as that already examined; that is, by dividing that sum by 115. The result is claimed to be $3,750,-608.22. This sum is deducted from the total freight earnings. Then it is said that the reductions by the Bill reached by dividing that sum by 1.295 are $491,906.25, which subtracted from $562,596.24 leaves $142,688.90, the amount of reductions.

Let the process be applied which has already been shown to be the correct one. The total freight earnings being $4,313,-

204.46 and local freight earnings being 15 per cent, if we move the decimal point two figures forward, which is a short way of dividing by 100, we have 1 per cent, and by multiplying what we find 1 per cent to be by 15 we have the 15 per cent. This gives $646,980 instead of $562,596.24. Twenty-nine and a half per cent of $646,980 is found as before by setting the decimal point two figures forward, which gives 1 per cent, and multiplying that by 29½ gives the reductions as $190,859, instead of $142,688.90 found by the other process, making a difference in that item of $48,170.10.

Recurring to the computations of the appellant, it will be seen that the reductions on local freight, claimed to be $142,688.90, are subtracted from earnings on all freight, that is, $4,313,204.46, leaving $4,170,515.45, which is said to be what the earnings on all freight would be if House Roll 33 had been in force. By deducting from that expenses on all freight, $2,501,935, the earnings on local freight are found to be $1,668,580 net. That result is a little surprising when we compare it with Mr. Dilworth's table on page 932. That shows "the total amount received for tons hauled locally" by the Union Pacific to be $398,262, a difference of $1,270,318. Of course, there must be a very great error somewhere. It will be found in the method of the calculation made for the appellants. By deducting reductions caused by the Bill on local freight from earnings on all freight and from that, cost on all freight, the inquiry is diverted from the effect of the Bill on local freight to its effect on all freight, with which we have nothing to do. The result is the preposterous figure given for "net earnings on freight within the State,"—$1,668,580.45—when all the earnings on that business, saying nothing of reductions by the Bill, did not reach that sum by a million and a quarter of dollars and more.

4. We are next treated to a most extraordinary computation. It is assumed that local freight earnings bear the same proportion to all earnings on the Burlington and the Union Pa-

cific; and as it is fifteen per cent on the latter that is to be applied to the business of the former. This assumption is most unreasonable, because the conditions and business of the two roads are very unlike. The Union Pacific road in Nebraska is 467 miles long; the roads of the Burlington are over 2,200 miles long. The former is one line running directly through the State; the latter is a system composed of a large number of roads, and forms a net-work covering the south part of the State. The Union Pacific is a through line doing almost exclusively an inter-state business, while a large part of the Burlington system is local. These facts are very clearly illustrated by the difference between the two roads in their per cent. of local to through business; that of the Union Pacific is 15 and that of the Burlington is 21.27 per cent. There is not the slightest justification for taking the per cent of one and applying it to the other in any calculation whatever. The reason for taking the percentage of the Union Pacific and applying it to the Burlington is very apparent. The lower the per cent the larger the profits appear. Thus, the Burlington's earnings were $1,853,036.57; if that is 15 per cent of the whole earnings, they amount to $12,353,577.26; if it is 21.27 per cent they amount to $8,711,972.59. The absurdity of the calculation is shown by the fact that it makes the earnings $12,353,577.25, whereas the proof is that they were $8,711,972.69. (See Taylor's table, page 593.)

All of the calculations are upon a false method and come to an absurdly exaggerated result.

5. The attempt is made in another way to support the extravagant pretension that roads are making a clear profit of 100 per cent. It is by the average earnings and cost per ton per mile. Mr. Taylor says, (591,) that the average amount earned per ton per mile on local freight was 2.079 and the average cost 1.370. These figures do not support the pretension. The difference is .709, which is only 34 per cent, as is shown by a very

simple process. It is by dividing .7090 by 2.079, which gives .3410 per cent. The effect of the Bill is easily shown. The reductions by the Bill, 29.50 per cent, with 10 added for extra cost of local freight, make a per cent greater than that of the earnings, which we have seen is 34.

An obvious mistake is made (p. 103 of the brief) in stating Mr. VanKuran's testimony on the point of operating expenses per ton per mile. It is said that, "including taxes," they are 4.9 mills. What the witness says is that, "excluding taxes," they are 4.9 mills, and, "including taxes," they are 5.23 mills. This correction disproves the statement that the result is that the profits of the Union Pacific on its interstate business in the State of Nebraska are nearly 100 per cent and that the profit on its local business is much larger. VanKuran says the earnings per ton per mile are 9.03, (not 9.3 as stated by Mr. Webster.) Deducting from that 5.23 leaves 3.80 net per ton per mile, which is 42 per cent instead of 100. The reduction of 29.50 per cent, added to the cost, which VanKuran puts at 58 per cent, with 10 added for extra cost of local freight, all amounting to 97.50 per cent, leaves a profit of 2.50.

It is also claimed (103 of the brief) that "the earnings per ton per mile on local business of the Union Pacific in the State of Nebraska are nearly five times as much as the average cost of hauling a ton a mile." That is certainly, as the appellants characterize it, an "astonishing result." How is it reached? It is by taking VanKuran's testimony, (618,) which is that the business beginning and ending in Nebraska was "about 15 per cent of the whole business, which would give a rate per ton per mile, earned on strictly local business in Nebraska, of 1.984." This proves nothing whatever as to the net earnings. But the above quotation is not all that VanKuran says; he says that "the rate per ton per mile earned on strictly local business in Nebraska would be 1.984 cents, at a cost of carriage of 1.135 cents per ton per mile." It was a strange oversight not to notice this clause of what VanKuran said that the cost of

carriage was 1.135 cents per ton per mile. Had it been observed the "astonishing result" would not have been reached that the Union Pacific earned on its local business five times as much as it cost. The difference between 1.984 cents, the earnings per ton per mile, and 1.135 cents, the cost of carriage, is .849 cents, which is a net gain of 42.7 per cent, instead of 500 per cent.

6. Another transparent fallacy is put forward. Beginning at page 1658 is a series of tables produced by Mr. Dilworth, showing from the reports of each of these Companies to the State Board of Transportation for the years ending June 30, 1891, 1892, and 1893, the average distance haul of one ton for a given number of miles, and "the rates per 100 pounds," and the "amount per ton for hauling" for the assumed distance which are allowed by House Roll 33 for each class of freight. Upon the figures thus presented, it is claimed (see appellant's brief, p. 173) that the law allows more than the average amount received by the roads; that is to say, the roads do not realize as much as House Roll 33 allows, and it is insisted that there is nothing in the Act for the roads to complain of. Most certainly they cannot complain of an Act which does not reduce their rates. But if this Act does not reduce their rates Mr. Dilworth made a sad mistake when he said it did reduce them 29½ per cent, and the learned counsel for the appellants has committed a great error in admitting all through this record and argument the correctness of the testimony of his own witness, client and associate, and has wasted a vast deal of arithmetic to figure it out that the roads make such enormous profits that they can stand a reduction of nearly one-third of their earnings. The tables do not give the materials for a comparison of the average amount received by the roads for one ton for an average distance of (say) 160 miles and the amount for hauling one article that distance. In the former all articles are included; in the latter each class is included.

The average of all cannot answer one class. In order to make a comparison we must have the number of tons of each class, so as to reach what was received for that class. If we know that, an average can be ascertained and the comparison made.

7. We will trouble the Court here with only one other of the contentions of the appellants. It is insisted that a railroad is only entitled to a fair return on the value of its property, without regard to its original cost, and that the "average value of roads in Nebraska will not exceed $20,000 per mile."

(1.) In our computations we charged against earnings of the Union Pacific, upon its local freight traffic, only the share which it should contribute to the requirements of the Thurman Act and the interest on its first mortgage debt, dismissing from the inquiry the subsequent liens and the stock and any compensation to shareholders. We also showed that the requirements of the Thurman Act and the first mortgage were of a peculiar character; so that it is not competent for the State to disable the Company from meeting those charges. The contention of the appellants now under examination, therefore, cannot be applied to that Company.

In our computations in respect to the Burlington and Elkhorn roads, we took account only of their mortgages, which in the case of the former, was shown to be about $20,000 a mile, and the latter about $15,000 a mile. If the value of these roads is only $20,000 or $15,000 (respectively) a mile, or if they may today be respectively reproduced for those sums, the problem practically is not changed from that which we solved.

(2.) But the proofs do not show that these roads are worth only $20,000 a mile, or can be reproduced for that sum. This appears from several considerations.

(*a*.) The witnesses called for the appellants in order to show the cost of the construction of a mile of road speak of the work when first turned over by the construction department to the operating department. But Mr. Calvert (1259) says that after

that further work has to be done to perfect the construction, which costs as much more.

(*b.*) The estimates of the appellant's witnesses are of a road through a new country; the construction of a road through the south part of the State through which most of the lines of the Burlington run, and the Platte valley, through which the Union Pacific runs, being well settled, must be very much more expensive. This is demonstrated by the experience of the Rock Island, which has within the past few years built a line through the South Platte at an expense, as Mr. Day shows, of $27,295.38 per mile, not including equipment, (1580 *et seq.*) The appellants insist that some deductions ought to be made from Mr. Day's statement. They do not very considerably reduce what he says the Rock Island road cost.

(*c.*) But the construction and equipment of a road by no means covers its cost. There are many items not included in them. One is the shops. Mr. Manning, Master Mechanic of the Nebraska Division of the Union Pacific, says (1516) that the machinery and shops of that Company in the State are worth $804,396.25. Mr. Hawksworth, Superintendent of Motive Power of the Burlington in Nebraska, says (1543) that the machinery in its shops is worth $357,957. Another item is supplies which must be kept on hand. Mr. Griffith, the General Purchasing Agent of the Union Pacific, says (1523) that supplies on hand March 1, 1894, were $1,576,961.30, and that in the course of the year the road uses about six millions. Although, on a mileage basis, the share of supplies for the main line in Nebraska is only $300,000, this witness says that that is by no means a fair sum to assign to that reach of road. Mr. Guild says (1542) that he is the Supply Agent of the Burlington, and that on the 29th of March, 1894, it had supplies amounting to $692,120, which was about 25 per cent less than the average of the supplies. Besides, a railroad like a trader must have in its treasury a sum not inconsiderable lying unused to meet exigencies as well as current needs. We are not

informed what these Companies carried in their treasuries for these purposes.

(*d.*) Still another item is to be taken into account: that is what may be called "good will." A railroad built in the early history of a State, as were those whose affairs are here under examination, which has been in operation for from twenty-five to thirty years, during which time the country traversed by it has been thickly settled, necessarily has gathered about it not only facilities for doing business, but influences which largely control the same. A new road, paralleling it, with the same terminals, structures, tracks, equipment, and so on, cannot at once, and probably cannot at any time, compete with the old road on an equal footing. A new road may draw to itself some of the business which has been tributary to the old road, but the proportion it may with the utmost effort secure will be always, or at least for a long time, only a fraction of what the old road retains. This is illustrated by the experience of an enterprise which was originated upon the false theories of the appellants here. The New York Central & Hudson River Railroad was bonded and stocked for a very large sum. Very judicious and cautious men believed that a road equally good could be built for a tenth of the stock and bonds of the New York Central, and constructed the West Shore and put it in operation, thinking that they would be able to draw to themselves at least one-quarter of the business of the Central. The scheme was good on paper, but it was not long before it was discovered that the West Shore could not compete with the Central, and, in fact, could not maintain itself. It soon passed into the hands of a receiver and was taken in by the Central for very much less than it cost.

Another fact illustrates what we are saying: the appellants think that the Union Pacific may be reproduced at an average cost of $20,000 per mile. An offer has been made of $50,000,000 for the property, including the Kansas branch, the two making 1,800 miles. This offer was subject to the first mortgage

of over $30,000,000, making the property cost the purchasers at the rate of $44,000 a mile. And this offer has been made for the property at forced sale and for cash. If the property can be reproduced for $20,000 a mile, why is this enormous sum offered for it? It is because the relations of the Company, the position of its road, and the power over great currents of business which it has acquired, give its physical property a value greatly beyond what it could be duplicated for.

(*e.*) Another circumstance is to be taken into account: it is absolutely impossible to reproduce any one of these roads. Their terminal facilities, around which industries and trade of great magnitude have gathered, cannot be duplicated. The same area of territory may be purchased, if you please, adjoining the lands on which are their terminal facilities, and precisely the same system of tracks may be laid out, and structures erected, and yet the value of the new works cannot be compared with that of the present ones. If a comparison were attempted, it would be like comparing the principal business street of a great city with the same structures on the naked prairie.

These considerations, which might be multiplied many times and illustrated in many ways, demonstrate the absurdity of the theory of the appellants.

In an appendix to this brief will be found extended computations stated shortly above.

SECOND POINT.

The provisions of the Constitution of the State of Nebraska limit the competency of the Legislature to fix railroad rates. Under those provisions, statutory rates must yield, not only cost and compensation the least possible, but in all contingencies cost and a fair profit.

I. The precise question presented here has never been considered by this Court. In no one of the cases from the *Granger Cases* down to this time has the Legislative power to prescribe rates been restricted by constitutional limitations: on the other hand, it has been considered as plenary, so far as it is defined in the State Constitutions. Beginning with the *Granger Cases* and coming down to the *Railroad Commission Cases*, the power was held to be purely legislative, and beyond judicial control. Ever since the *Commission Cases* the doctrine has been that, under the Federal Constitution, statutory rates must yield cost and some compensation, and that the measure of compensation remains a question for the Legislature.

In Nebraska the question is not whether statutory rates operate confiscation, or yield compensation a shade above confiscation: it is advanced far beyond that. It is whether the statutory rates are reasonable, and will continue reasonable from the time they are fixed to the time when they can be revised. This will be readily seen by a review of the history of the constitutional provisions and their terms.

Before the Constitutional Convention of 1875 met, a controversy of great bitterness had been waged in the legislative and judicial forums of several of the States. Acts were passed severely reducing railroad charges, and, as the Companies contended, below what was fair and just. The validity of

these laws was questioned in many litigations between the States and the Companies. In 1875, some of them had been carried through several of the Circuit Courts of the United States, and others through the Courts of the States, and some were pending in the Supreme Court of the United States. The laws were put in force. But very soon afterwards it was found that the Legislature in striking at the Companies had wounded the interests of the people. The Act of Wisconsin known as "The Potter law," passed under an excited public feeling and being most radical in its terms, was repealed in as great haste as it was enacted. The same thing happened elsewhere. Instructed by this experience and having in view this great contention, the Constitutional Convention was called upon to deal with the subject. Taking into consideration the rights and the interests of both parties, the public and the Companies, it was deemed wise, on the one hand, to assert the power of the State as it had been declared by the Courts, and, on the other, to limit its exercise.

Section 1 of Article III of the Constitution reads: "The legislative authority is vested in the Senate and House of Representatives." This is a grant of plenary legislative authority: whatever is of the nature of that authority passes to the two Houses. As the fixing of railroad rates is one of the inherent functions of the Legislature, it is necessarily within the general grant of legislative authority as much as any other subject. No special provision was necessary: no form of words could enlarge the grant. Had the framers of the Constitution intended that the Legislature should be wholly free to act upon the subject of railroad rates according to its own wisdom or pleasure, they could have done so in no way so certainly or so effectively as by saying nothing about it; they could hardly say any anything, but every word they uttered would operate a limitation upon the general grant.

But the Convention was not content to leave the subject with the grant of plenary legislative authority. Two other

provisions were inserted in the Constitution. Section 7 of Article II provided that:

"The Legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph and railroad companies, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of property and franchises." This enjoins upon the Legislature the duty of passing laws against extortion. It was inserted for that purpose and not in order to enlarge the legislative authority: that was not necessary or possible. The Legislature could pass such laws without express constitutional command. Even if it disobeyed that command, a carrier guilty of extortion could at the common law be reached by action and by indictment. The provision was worth something, because it emphasized the duty therein enjoined, but was not otherwise useful. Another clause was inserted in the Constitution. Section 4 of Article XI, after declaring that railroads are public highways free to all for the transportation of persons and property, provided that "the Legislature may from time to time pass laws establishing reasonable maximum rates of charge for the transportation of passengers and freight on the different railroads in this State." This clause differs from the other in an interesting point; in that the duty was imposed by an imperative command; in this the Legislature was left free either to enact statutes fixing rates or not to deal with the subject at all. What was provided was that if the Legislature saw fit to pass laws establishing railroad rates, such rates should be the highest the Companies could charge, and these highest rates should be reasonable. The three clauses which have been mentioned when applied to this subject may be read thus: "The legislative authority shall extend to establishing railroad charges, and the duty is hereby enjoined upon the Legislature to pass laws to prevent extortion. But if the Legislature in the exercise of its discretion pass laws establishing rates, it shall estab-

lish such rates only as are the highest which can be charged, which highest rates shall be reasonable." This was a distinct qualification of the grant of plenary legislative power.

And this appears not only from the language and the relations of the several clauses of the Constitution, but from the object of Section 4 of Article XI. We need not trouble ourselves to search for that object in the several provisions of the Constitution or elsewhere, for it has been authoritatively declared by the Supreme Court of the State. In *The State v. The Missouri Pacific Railway Co.*, 29 Nebr. 550, 560, that Court held that "one object of this clause was the protection of the Companies against oppressive legislation." That being the object of the clause, it was a limitation of the plenary power granted in Section 7 of Article II. Statutory rates, which work confiscation, are not reasonable; but rates may not work confiscation and yet be unreasonable.

The legislation in the State follows these two clauses of the Constitution. In 1887 an Act was passed to prevent extortion. (See copy at the end of this brief.) House Roll 33 was passed to fix rates.

II. There is a radical difference between a Company fixing its own rates and the State fixing them for the Company.

A railroad enterprise depends upon its own merits for success; its projectors must exercise a measure of sagacity, and will find their venture a success or failure, or more or less of one or the other, according to the judgment with which they act.

If the road they propose to build run through a country which supplies iron, ties, timber, etc., at cheap prices, and labor content with low wages, and which will furnish a fair volume of business without competition by water or other rails, it will probably prove profitable. But if, on the other hand, building material must be brought from a distance and at great expense, and wages are high, or if the country has nothing to

be carried, either because it is without resources, or because the sea, or rivers, or canals, or other roads, afford all the facilities which the business of the country requires, the venture will prove a failure; a man of good judgment will flee from those who invite him into such an investment.

When a road has been built the success of its operation depends on the judgment with which it is carried on just as much as did its original location and construction. It is still in the grasp of forces heedless of its wishes and good intentions. The risk has been taken, the investment made and the road built. The embankment, rails and other works cannot be removed; the road is there to stay; it must be operated just where it has been built whether it makes any money or not. And in nothing is it more in the grasp of forces which are beyond its control than in the matter of its charges; they are fixed for it and not by it. If it run through an unsettled and undeveloped region, it may be under the necessity of running at a loss for a time; and if its managers are wise, they may for a time run it for cost, and even at a loss, in the hope that the country will be settled business be developed and something be earned bye and bye. But, even where there is business, the manager is bound hand and foot. If his is the only road running through the country, he is still subject to competition, potential if not actual, for the country is full of capital seeking investment, and large profits of one road will invite another and another until the business is ruinously divided.

And competition comes in other forms, as may be seen by a very simple illustration. The farmer in raising his crop of corn expends a sum, more or less, for labor, seed, machinery and so on, and sends it to market by rail. The price in the market is fixed; it is fixed, not by the farmer who has the corn to sell, nor by the grain dealer who wants to buy it; the one must take and the other must pay the market price. There is no help for either. That price is fixed by the supply of corn

and the demand for it. If the demand is large and the supply small the price will be high. In that case the corn will bring enough to reimburse the farmer his expenses and something more for his labor and investment, and also cover cost of transportation; and the railroad may, fairly to the farmer and justly to itself, charge good rates. If, on the other hand, the supply exceeds the demand, the price of the corn in the market will be low.

If when the market is low the road maintain the prices of years when the market pays fair prices, so that the corn will not bring cost of raising and transporting it, the farmer will crib it, and the road be left without anything to haul: its cars will run empty, or not at all. And, while lying idle, a large part of its expenses, such as maintaining the road in repair, wages and interest on its debts, are going on much the same as when its trains are full. In such case the road finds it to its advantage to reduce its rates, so that the farmer realizes the cost of his crop, and the road makes what it can; for it is better to earn a little when it cannot get more, than nothing at all. In fact as a large part of its expenses in any case are running, it is the better part to do the business for nothing or less than nothing. And that is what the road will do; for, if it thinks only of today, and will not help the farmer in his stress, and throws his crops on his hands without a market, so that his investment is lost, he must soon seek a better land; his house will become a ruin, his farm a wilderness, and the road "two streaks of rust." Even when the market price of corn is so high as to fairly cover cost of raising and transporting it, the road is still under restraint; it cannot exact extortionate rates, for that is a crime to be punished; nor unreasonable rates, for there is not, in all this country, a region which has not railroads, two or more, engaged in deadly competition, which brings rates down to the lowest possible point. This illustration applies not only to farming, but to every other indus-

try, trading, manufacturing, mining, and whatever business requires transportation by rail. The road must give rates which will make the operation of those industries profitable. If the market is good, rates may be good; if the market is poor, rates must be low. In this way railroads, more than any other class of business, are the subjects, often the sport and play, of the law of supply and demand. Their tariffs are framed by competition, not only between themselves but between operators of all the different industries which they serve.

These are very simple illustrations, which might be verified by the history of a great many railroads of the fact that they are compelled to accommodate their rates to conditions and circumstances; and that economic forces not of their making nor under their control dominate them.

There is nothing in these circumstances peculiar to railroads. Everybody living in an industrial society is under the same compulsion. The trader seeking a place in which to open his stock of goods, the manufacturer looking for a site for his plant, even the farmer choosing the country to which to emigrate, must exercise good judgment or a life of toil will end in disappointment; and once embarked in his venture he must accommodate himself to circumstances. If the merchant is in the midst of sharp competition, or is in any season disappointed in his trade and is overstocked, or fashions change and his goods are not up to date, he must draw custom by special attractions or low prices or forced sales. So it is with the manufacturer, and so it is even with the farmer. That phrase ever in the mouth of the political economist, the law of supply and demand, may be very tiresome; but it is as pervading and invariable in the world of exchanges as that of gravitation in the world of matter.

Nor must the railroad accommodate its rates to the conditions and circumstances of one time, but it must follow changes which are taking place from day to day. A thousand things are happening all the time which justify the raising or com-

pel the lowering of rates. A large crop or a small one, a war in Europe, a famine in India, great activity or depression of trade, change or fear of change in current money and so on, cause a perpetual flux and reflux of rates, which are not capricious, but which answer changes of conditions and circumstances as certainly as the ebb and flow of the tide. Let a manager be heedless of them and he might as well have built through a barren land, or where there were already more facilities of transportation than were needed and competition had reduced rates below the paying point. Let him be quick to foresee these changes and to meet them, and he will have the best of his competitors just as any man of sagacity will outstrip the dullard.

All this is different when the State undertakes to fix railroad rates, because it is bound to fix rates which yield cost and some compensation. Accordingly, in the case of a road doing business upon rates which under the law of supply and demand do not earn operating expenses, of which there are, as this record shows, several in Nebraska, the State cannot reduce such rates, simply because its power of regulation is limited by the constitutional provisions protecting private property. This is true in all cases, no matter whether the infirmity of the road lies in the fact that it was built in a region where it was not wanted, or the business of that region, at first promising good returns, has fallen off, or competitive lines of transportation have absorbed it all. In these cases and in any others that can be imagined, the State cannot compel a company to operate its road and at the same time limit its charges to rates which will not pay operating expenses and something more.

And for the same reason the State cannot follow the changes of conditions and circumstances which are all the time taking place and are often radical and which necessarily affect rates; at one time justifying comparatively high and at another compelling low rates. And this is more especially true where,

as in Nebraska, the Legislature sits for a period of only ninety days and only once in two years.

This has been well expressed. Mr. Justice Woods in *Tilley v. The Savannah Railroad*, 5 Fed. 641, said that "the question what are just and reasonable rates is one which presents different phases from month to month upon every road in the State, and in reference to all the innumerable articles and products that are the subject of transportation;" for which reason he held that a Legislature composed of a large number of members, sitting for a limited time and at long intervals, is incompetent to respond to that question. And in the *Chicago & North Western Railway Co. v. Dey*, 35 Fed. 866, Judge Brewer said that "what would be fair and reasonable today, six months or a year hence may be either too high or too low," and that "a Legislature convened once in two years cannot make rates which will continue to be fair during so long a period." The State cannot give heed to the law of supply and demand which must govern all the dealings of men and societies and limit rates to what may answer at the time it fixes them, if they are to obtain for a long time.

III. But the State is subject to another disadvantage. The full force of the doctrine that statutory rates must yield cost and some profit, is not felt when the general statement is made. It is only satisfied when it is applied to every article which is the subject of transportation, every rate that is established and every shipment that is made. The constitutional limitation to which the legislative power is subject, compels the State to fix rates which upon each transaction yield cost and some compensation. And yet certain kinds of traffic will not bear rates which yield cost and a fair profit. Some articles are of great relative value, which can be compactly packed, and are not heavy—such as silks and teas; these will bear a high rate. Others, of low relative value, heavy and bulky, such as coal and iron, will bear only low rates. If the same rates are exacted for coal and iron as silk and tea, coal

and iron cannot be profitably shipped; the business of mining and marketing them must be given up, to the common loss of the public and the carrier. On the other hand, if silk or tea be carried at the same rates as coal and iron, the carrier will not be fairly paid for his service, and in the end will be driven out of business. That method of making rates is impracticable. Railroad charges are like a butcher's prices. He buys a beef on the hoof at so much per pound for the whole animal, say three cents. When he cuts up the carcass and offers the parts to his customers, he does not charge the same price for all of them, say fifteen cents per pound all around. If he were to do so, no one could afford to buy the hide or the shin, for they are not worth more than, say, half a cent; nor can he afford to sell the tenderloin or the ribs to those who want those cuts at a common rate, for that would not make him whole on his purchase. He distributes the whole cost of the animal among the parts, according to the price which the demand for them repsectively will bear; twenty-five cents per pound for the tenderloin and half a cent for the hide; twenty cents for the ribs and one cent for shin; taking care that the sum of them all equals the cost of the whole animal, and something over for profit.

The manager of a railroad, understanding these conditions and yielding to their force, does the same, making one hand wash the other; and being careful only to make the aggregate of earnings exceed the aggregate of cost. It is just what every man does in business. The merchant sells some articles for less than cost, in order to keep his stock full and be able to fill the orders of his customers, putting prices of other articles high enough to cover the loss. The manufacturer makes some articles which do not pay in order to sell others that do pay, but looking always to the general result. If any one make or sell at random, without calculating the general result, he is more than likely to find, after awhile, that he is a fit subject for the bankruptcy court.

But the State cannot do this: it cannot compel the road to carry one article for less than cost because it allows more than cost on another. The constitutional limitation requires that every rate on every article standing by itself shall yield cost and some profit. If the State needs the use of a railroad for the purpose of running one train over it, it cannot appropriate that use to its purposes and pay less than it is worth, because the road makes something, much or little, on the uses which remain. It cannot appropriate the road for one purpose and pay less than it is worth, because the road when operated for other purposes makes large earnings. What the Company makes is its own, which the State cannot touch when paying for the use it makes of the road.

If the State propose to lay a road through my farm what it must pay me is the value of the strip of land it takes and not a proportionate share of the value of the whole tract. The strip it takes may be worth more than an average value of all acres in the tract and this average value cannot be distributed over the whole and a share awarded me: I am entitled to the whole of the peculiar value of that particular part of my land that is taken. On the other hand the strip taken may be worth less than an average of the value of the whole, and I cannot claim more than it is worth because the average value exceeds that. If I have a herd of a hundred horses and the State impresses five into its service, when it comes to pay me it inquires what is the value of those five horses, considering their good and bad qualities; whether they are sound or well broken, or young, or fast, etc., and not what the hundred are worth, giving me five one-hundredths of their value.

The same is true when the State fixes the rate on iron, coal, lumber and other bulky and heavy articles, it cannot make those rates so low that they will not yield cost and some profit. It is no matter that the iron, coal and lumber will not be shipped if rates which yield cost and some profit are exacted. It is confiscation to compel a road to run a train today for

less than cost and some profit, and it is none the less confiscation because the road earned much more in running another train the same way and the same distance; and it is confiscation to compel a road to carry one article for less than cost and some profit, and it is none the less so because the road may receive for carrying another article ten or twenty or fifty per cent more than cost.

IV. It may be objected that the result reached by these considerations is that the State is practically powerless to limit railroad rates; and that the grant in the Constitution of the power to do so is reduced to a shadow without substance. If that were true it does not meet the argument. Constitutional rights are too high and too sacred to be overborne by inconveniences which may be entailed by particular circumstances. It is better that the State should be unable to take my property, than that it should take it without paying for it and overturn a provision of the Constitution. If, as has lately been said here, this is a Government of laws and not a Government of men, the supreme law of the Constitution must be upheld against every claim or pretense of power.

But there is an easy escape out of this difficulty: it is by doing the same thing when the State appropriates to the public the use of the railroad as when it takes property for the public; that is, pay for it. The same rules apply to one case as to the other; in both compensation must be provided; it must be paid when the use of the road is taken, or a speedy, certain and ample remedy must be provided for compelling payment.

The Boston & Lowell Railroad v. The Salem & Lowell Railroad, 1 Gray, 1, was a bill by one Company to restrain another from entering upon and using its tracks under an Act authorizing it, but not providing compensation.

Mr. Chief Justice Shaw, in an elaborate opinion, held that

in order to the validity of the Act, compensation must be provided in such a case as well as in any other.

See also *Jersey City & Bergen Co. v. Jersey City & Hoboken Co.* 20 N. J. Eq. 61,

It is not enough that rates are allowed on some freight which will yield more than cost and a fair profit, and thus cover loss on other freight. In the ups and downs of business there is no certainty that there will be enough high-class freight to cover the loss on low-class, nor that the high rates allowed by the statute can be realized. In these and other circumstances there are contingencies. The State may, if it please, assume the risks; it may do so by providing for the payment to the road, or by agreeing to pay the road what it may lose if the earnings on the high-class do not cover the losses on low-class freight. It may, perhaps, do so in some other way. But it cannot throw the risks on the road. It must provide compensation, or speedy, certain and ample remedy to recover it.

Connecticut Co. v. County Commissioners, 127 Mass. 50.

This Act does not pretend to meet these constitutional requirements, and, upon the plainest principles, is void.

V. There is another contingency against which a statute fixing rates must provide. Where, as in Nebraska, the Legislature meets only every other year and sits only ninety days, changes of conditions and circumstances are certain to take place in the interval, and with such changes the rates under the operation of the law of supply and demand must correspond. To state this in another way: The Legislature may fix rates at one session which must continue in force until another; those rates may at the first session yield cost and a fair profit; but before the second, changes of conditions and circumstances may make them insufficient for that purpose. Against such contingencies the statute must provide.

It will not do so by taking the most favorable conditions

and circumstances as the test. This is illustrated in this record. The business of 1892 was taken by the Legislature as the basis of its action. That was a better year than any before or after it. In the last six months of 1893 the business of the Burlington fell 25 per cent and that of the Union Pacific 50 per cent below that of the same period of 1892. From 1893 the business of all roads has been at the minimum. Statutory rates fixed on the basis of the business of '92 were not fair for the business of the years succeeding it.

Reasonable maximum rates fixed by statute must be based upon the most unfavorable conditions and circumstances, otherwise, they may come within the limitations of the Constitution.

It cannot justly be objected that this leaves the roads a large liberty without protecting the public. When the conditions are favorable, the statutory rates will restrain the roads within their limits; and when the conditions are unfavorable, the law of supply and demand will compel roads to reduce their charges accordingly. The efficiency of that law to compel the reduction is demonstrated by experience. When, during the last twenty-five years the roads have been left to themselves, they have, under the compulsion of that law, reduced their rates to a most remarkable degree. The general ton-mile rate throughout the country has, in that time fallen nearly sixty per cent. The lake and rail rate on wheat from Chicago to New York has fallen 75 per cent; and the all-rail has fallen 65 per cent. On corn the fall has been 62½ and on provisions 50 cents. In Nebraska within the last fifteen years the average ton-mile reduction exceeds thirty per cent. This change in rates has not been brought about by statute nor by the voluntary action of the roads, but by the operation of economic forces which are summarized by the expression, the law of supply and demand. Under its compulsion the roads cannot abuse their liberty nor the public suffer. Reasonable maximum rates when fixed by

statute may be defined thus: they are rates fixed upon a line so high as to have underneath it room for the play of the economic forces which govern the Companies when fixing rates below that line.

House Roll 33 does not pretend to answer this description; the rates limited by it are therefore not reasonable and violate the provisions both of the State and Federal Constitutions.

THIRD POINT.

House Roll 33 is unconstitutional because it attempts to fix and limit the rate which the Union Pacific Railway Company may charge for transportation of freight on its lines between points within the State. That Company is within the language of the Act, and the Board of Transportation so construes it. (Answer, Par. VI.)

The Union Pacific Railroad Company was incorporated by an Act of Congress passed in 1862. (12 St. 489.) An Act amendatory of the charter was passed in 1864. (13 St. 356.) This Act authorized any or all of the Companies mentioned therein to consolidate their oaganizations. (Sec. 16.) Under this authority the Union Pacific Railroad Company, the Kansas Pacific Railway Company, (at one time known as the Leavenworth Pawnee & Western, and afterwards as the Union Pacific Railroad Company Eastern Division,) and the Denver Pacific Railway and Telegraph Company, became consolidated under the name and style of the Union Pacific Railway Company.

These acts establish the whole frame and structure of the Company. It constitutes the stockholders the body politic and corporate, and vests in them plenary power to lay out the whole scheme of administration. It provides for directors, some to be elected by the stockholders, and others appointed by the President of

the United States, and defines their duties; for the election of the principal officers of the Company and the appointment of inferior officers; and for the annual meetings of the stockholders. In these and other like respects the charter does not differ from similar Acts.

The original Act authorized and required the construction of several roads: one a main trunk, beginning at a point to be fixed by the President of the United States within narrow limits, and running west to a junction with the Central Pacific Railroad, to be built from California east, (Sec. 8;) another, a branch from the Missouri River at the mouth of the Kansas to the aforesaid initial point of the trunk, (Sec. 9;) a third from a point on the western boundary of Iowa, to be fixed by the President; and a fourth from Sioux City. (Sec. 14.) The routes of all these roads were to be approved by the President and determined by him. So, too, he was to fix the point of their connection, and the width of their tracks. And the grades and curves were also prescribed. Subsequent Acts were more specific in defining the construction of the roads and their character.

The object of the incorporation of the Company is stated in the original Act to be "to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores," (Sec. 3,) and "to promote the public interests and welfare by the construction of said railroad and telegraph, and keeping the same in working order; and to secure to the Government at all times, but particularly in time of war, the use and benefit of the same for postal, military and other purposes." (Sec. 18.)

The service which the Company was required to render to the Government was to "at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies and public stores upon said railroad for the Government whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all purposes aforesaid at

fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service." (Sec. 6.)

The Act granted the right of way through the public lands, power to take from lands adjacent to the lines earth, stone, timber and other material for the construction of the road (Sec. 2), every alternate odd-numbered section on each side of the road to the extent of five alternate sections per mile (Sec. 3), which in the act of 1864 was increased to ten sections (Sec. 6), and Government bonds each for $1,000 to the amount of sixteen per mile, which were made a lien on all the Company's property. The Company was required to pay these bonds at their maturity. (Sec. 6.) Twenty-five per centum of them was to remain in the Treasury undelivered, until the road and all parts thereof were finally completed; and if it were not completed within the time limited, the bonds so reserved were to be forfeited. (Sec. 17.) Upon refusal to redeem the bonds or any of them "when required to do so by the Secretary of the Treasury, the road and all the rights, functions, immunities and appurtenances thereunto belonging and all lands granted to the Company" remaining in its ownership, were to be taken possession of by him for the use and benefit of the United States. (Sec. 5.) Compensation for services rendered by the Company to the Government was to be applied to the payment of bonds and interest until the whole amount should be fully paid; and until the bonds and interest were paid, at least five per centum of the net earnings of said road should also be applied thereto. (Sec. 6.)

Congress also reserved to itself the power to reduce rates of fare, if unreasonable in amount, and fix and establish them when the net earnings of the entire road exclusive of the five per cent to be paid to the United States should exceed ten per centum of its cost. (Sec. 18.) And the better to accomplish the object of the Act, it reserved to itself the right to add to, alter, amend or repeal the Act. (Sec. 18.)

The construction of the road within a limited time, its maintenance and operation, were rigorously enforced by forfeitures as follows: "In case said Company * * * fail to comply with the terms and conditions of this Act, by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same for an unreasonable time to remain unfinished or out of repair and unfit for use, Congress may pass any Act to ensure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States to repay all such expenditures caused by the default and neglect of such Company or Companies: *Provided*, That if said roads are not completed so as to form a continuous line of railroad ready for use from the Missouri River to the navigable waters of the Sacramento River in California by the first day of July, eighteen hundred and seventy-six, the whole or all of said railroads before mentioned and to be constructed under the provisions of this Act, together with all their furniture, fixtures, rolling-stock, machine-shops, lands, tenements, and hereditaments, and property of every kind and character, shall be forfeited to and be taken possession of by the United States." (Sec. 17.) The Company was also required to build a branch from a point on the western boundary of Iowa, to be fixed by the President, to the initial point of the main trunk on the 100th Meridian. And it was provided that in case of failure upon the part of said Company to make said connection in the time aforesaid and to perform the obligations imposed upon it, and operate the road in the same manner as the main line was required to be operated, it should forfeit to the Government of the United States, all its rights, privileges and franchises. A like forfeiture was denounced in case the Company failed to build another branch from Sioux City, (Sec. 14.)

In order, further, to secure the construction, maintenance

and operation of the road and the interests of the Government in the property, Congress has passed a long series of Acts of most stringent character. On the 10th of April, 1869, a series of joint resolutions to that end were passed, (16 St. 56,) in which, among other things, it was required that the President withhold from the Company an amount of subsidy bonds sufficient to secure the full completion of the road, or in lieu thereof receive as such security an equal amount of the first-mortgage bonds of the Company; and the Attorney General was directed to institute proceedings to compel the giving of such security, (Sec. 3.) The Attorney General was also directed to inquire whether the charter and the franchises of the Company had not been forfeited, and whether illegal dividends had not been made to the stockholders, and to take and institute necessary proceedings for the recovery of the same. In the appropriation Act of June 30th, 1874, (17 St. 485,) the Secretary of the Treasury was directed to withhold all payments for freight transported by the Company for the Government, (Sec. 2;) and the Attorney General was directed to institute a suit in equity in the name of the United States against the Company and others to recover its assets illegally dispensed; and jurisdiction was conferred upon the Circuit Court to hear and determine all cases of mandamus to compel the Company to operate its road as required by law. (Sec. 14.) The Thurman Act (20 St. 56) contains many particular provisions designed to secure the Government against the Company's defaults, directs the Attorney General to enforce its rights by appropriate judicial process, and provides for the forfeiture of all its rights, privileges and franchises, if it fail to perform its duties within six months. The Telegraph Act of 1888, which has recently been the subject of inquiry here, requires the Company to operate its telegraph line as required by the charter, and directs suits to compel the performance of this duty. Several other acts of the same general character have been passed from time to time by Congress. They all form a body

of legislation asserting the rights of the Government over the Company, its property and operations, and providing various stringent remedies for their enforcement.

The declared objects of the acts, their explicit directions for the construction of the roads, the services to be rendered, the powers reserved over the properties, and various other provisions, impress upon the Union Pacific Company the character of an agency of the Government in its most vital parts.

I. It is too late in the day to take a moment's time to prove that the States cannot interfere with any of the operations of the General Government. And in administering its affairs that Government may act directly by its own officers, or it may make use of any appropriate agency. In proper cases Congress may create a corporation to render certain services to the Government. At one time it created a bank to be the fiscal agent of the Government, and this Court held that such a corporation was a proper means to effect its legitimate objects.

McCullough v. The State of Maryland, 4 Whea. 316.
Osborn v. The United States Bank, 9 Whea. 738.

And such an instrumentality, when once adopted by Congress for such purposes, is in its operations as far beyond any interference by a State as the Army or Navy or the Postoffice. Attempts were made by two several States to tax the operations of the Bank, but this Court held such attempts futile. In the Pacific Railroad acts of 1862 and 1864 Congress granted to the Central Pacific Company some of the franchises which we have seen it granted to the Union Pacific Company, and the State of California attempted to tax them. This Court held that for the State to lay such a tax was "not only derogatory to the dignity of the Federal Government, but was repugnant to its paramount sovereignty."

California v. The Pacific Railroad Company, 127 U. S. 1.

To be sure, that was a case of taxation and this is one of regu-

lation; but as Mr. Justice Miller said in *Wabash Railroad Co. v. Illinois*, 118 U. S. 557, 570, it is impossible to see any distinction between a statute which regulates the charges for transportation and a statute which levies a tax.

It is true that this Court has supported a tax upon the property of this Company.

Thomson v. Pacific Railroad, 9 Wall. 579.
Railroad v. Peniston, 18 Wall. 5.

These cases have not an unqualified authority. Eight judges heard the last case. Mr. Justice Strong delivered the opinion of the Court, and Justices Clifford, Miller and Davis concurred in it. Mr. Justice Bradley delivered a powerful dissent and Mr. Justice Field concurred with him. Mr. Justice Hunt dissented generally. Mr. Justice Swayne concurred in the judgment; but was of opinion that Congress could waive the exemption from taxation and had done so; but he held that the road was a national instrumentality of such a character that Congress could interpose and protect it from state taxation whenever it deemed it proper to do so.

Even if the judgment has decisive authority, it does not qualify the doctrine of the two bank cases cited. Mr. Justice Strong was very careful to mark the distinction between those cases and that of the Railroad Company: the tax in the former being upon the operations of the Bank, and in the latter upon the property of the Railroad. An Act regulating railroad rates operates upon the franchises of the Company and is within the doctrine of the bank cases, and is not within that of the railroad cases.

We have been at pains to state with some particularity the provisions of the Acts of Congress relating to this Company, and have drawn attention to its character, the objects for which Congress created it, the control over its affairs, property, and management, which is reserved, and the interests of the Government therein, in order to point out very wide distinc-

tions between the Union Pacific and the Texas & Pacific Companies, and in that way meet the contention that this case is ruled by *Reagan v. The Mercantile Trust Company*, 154 U. S. 413.

The Texas Company is on the same footing as the Union Pacific in these respects: it was incorporated by Congress, (16 St. 573;) a grant of land was made to it; its road was declared a military and post road; and it was made "subject to the use of the United States for postal, military, and other governmental purposes, at fair and reasonable rates of compensation not to exceed the price paid by private parties for the same kind of service; and it was provided that the Government shall at all times have the preference in the use of the same for the purpose aforesaid." It may not be impertinent to say in passing that every congressional land grant to railroads has contained similar provisions.

These are all the provisions common to the charters of the Texas and Union Pacific Companies. Besides them, the Acts relating to the latter contain provisions of great force, vigor, and stringency, by which it is devoted to the service of the Government. The case of the Texas Company may have been rightly ruled, but it is not decisive or applicable to the case at bar.

II. In the provisions of the Acts which have been partially quoted, besides grants of lands, loans of Government bonds have been authorized. The Acts impose upon the Company the duty of reimbursing the Government these loans when required to do so by the Secretary of the Treasury, and apply five per centum of the net earnings and compensation for services rendered by the Company to the Government, to the payment of the bonds, and also made them a lien upon all the corporate property. Various subsequent Acts fortify the rights and remedies of the Government. This Court having decided that the Company was not required by these Acts to pay the interest on this debt until the principal became due, the debt

was rapidly increasing, with the certain result of reaching an amount in excess of the value of the property, which would expose the Government to heavy loss. To anticipate this threatened mischief the Thurman Act was passed. Among other things, it provided that the Union Pacific Company should annually pay into a sinking fund 25 per cent of its net earnings. Mr. Mink, the Comptroller of the Company, informs us that these sums amounted to a good deal more than $1,000,000 annually for each year from 1889 to 1892, both inclusive, (p. 710;) and that the whole debt to the United States is $52,948,663.91, (p. 709.)

This enormous debt is property of the United States. As such, it cannot be dealt with by the States in any manner nor to any degree; no more than money in the treasury, or property used in the postal service, or the operation of the mint, or the collection of the customs. It is no answer to say that the liability of the Government to loss is remote, or that the amount of loss may be inconsiderable. We know that such is not the case: the fact is, that reductions of the revenues of the Company are just so much money taken from the treasury of the United States. But that is not the question. The right of the State cannot be admitted, whatever the effect of its exercise. Appropriating what was said by the Court in the bank cases, "if the right to reduce the earnings of the Company and impair the security of the Government exists, it is a right which in its nature acknowledges no limit. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it."

We submit that it is not within the powers of the State of Nebraska to interfere with the revenues or income, or the sources of the revenues or income of the Union Pacific Company, because that Company is a debtor of the United States to a large amount, and its earnings are irrevocably pledged to the payment of its debts.

There is another consideration which conducts us to the same result.

We have seen that the object of Congress in granting the charter of the Company was to provide an instrumentality for the transportation of the mails, troops, and government stores, particularly in time of war; and that this service is exacted under severe penalties. This object cannot be realized and this service assured unless the road is kept in repair and efficient operation; and the Company is laid under forfeiture of all its property and franchises in case it fail in these duties. If the State can meddle with the Company's earnings, it may reduce them to such extent as to leave it without means to maintain and operate its road, and ready to render the service exacted of it; its efficiency as an agency of the Government may be so impaired that it cannot transport troops and munitions of war as promptly and safely as the exigencies of any moment may imperatively require.

We know that a State cannot tax bonds of the United States. (*Weston v. The City Council of Charleston*, 2 Pet. 449.) The reason assigned by the court is, that such power in the hands of a State may disable the Government to borrow money, however urgent the exigency or imperative the demands of the moment. Nor can the State of Nebraska disable this instrument of the Government to maintain its road in efficient operation, so as to be ready at all times to answer its call for the transportation of its mails, stores, troops, and munitions of war.

If in the exercise of its ligitimate powers the General Government should be free and unembarrassed by any conflicting claim on the part of the States; if the powers of a State cannot rightfully be exercised so as to impede and obstruct the free course of those measures which the Government may adopt; and if to that end the Government may make use of a corporation of its own creation as a suitable instrumentality, then this House Roll 33 is beyond the constitutional competency of the

State, so far as it applies to this agency of the Government. The great and fundamental principle which we invoke has application here or the Government is powerless elswhere to exercise its necessary and highest functions.

III. Section 18 of the Act of 1862 provides that "whenever it appears that the net earnings of the entire road and telegraph including" etc. "shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law." This provision withdraws from the State all power over rates to be charged by the Union Pacific Company.

It is said that the section applies only to fares of passengers and not to charges for freight. This contention rests on the single word "fare;" the clause is, "Congress may reduce the rates of fare." It is too narrow a construction to confine this clause to passenger fares. Every word and clause in the provision and the whole reach and import of it is against such limitation. The power reserved to Congress to reduce the rates does not depend upon the passenger earnings, but upon earnings from the whole business. The words are, "Whenever it appears that the net earnings of the entire road and telegraph," etc., shall exceed ten per cent, etc., then the reserved power comes into operation. If the purpose were to reserve the power to reduce passenger rates only, the contingency upon which it depended would not be likely to be the earnings on all other business. So, too, the method prescribed in the section for ascertaining the net earnings contemplated other items than those connected with passenger service. Deductions are to be made for all expenditures, including repairs and the furnishing, running and managing of said road. There is a manifest incongruity in reserving the power to reduce the charges for carrying passengers, and making it dependent upon what may remain after deducting all expenses of all other classes of business.

While these considerations dispose us to adopt the larger meaning of the word "fare," there is another which is decisive.

This road was to be built from one of its termini to the other through an unpopulated region; a region a large part of which was incapable of being populated. That was a fact so well understood in 1862 that the enterprise was generally regarded as foolhardy. The passenger business was a very small matter; it was but a fraction of the service which was exacted of the Company. As is the case with all railroads, and especially those running through new and sparsely peopled regions, the main business and the main source of income and the great interest is the transportation of freight. It is very unreasonable to suppose that in this legislation, characterized by a prudence, wisdom and aptness of provisions unsurpassed and hardly ever equaled, the greater matter would have been overlooked, and the smaller matter have been so carefully attended to.

And we may look farther for an explanation of this clause. In Section six of the Act, the duty is laid on the Company of transporting the mails, troops and munitions of war, supplies and public stores, "for the Government at fair and reasonable rates of compensation, not to exceed the amounts paid to private parties for the same kind of service." The measure of compensation which the Company was entitled to for Government service was what private parties should pay for the same kind of service; that is to say, for transportation of freight. It was therefore a matter of moment to the Government that the freight rate should be kept under control. This was done only in the clause under consideration; if it be not there, it is not anywhere. It is not possible to resist the conviction that Congress intended to reserve a power over the rates of freight which was of very great importance to the Government. And this especially when it was making some reservation of that nature.

We submit that the very narrow meaning which the appellants place on the word "fare" is inconsistent with the other clauses of the section, and above all, with the intention manifested in other provisions of the Act, and in its whole scope, import, and purpose.

2. This objection being removed out of the way, we may go on to the question whether, reserving to itself control over rates, Congress withheld all that matter from the State.

It is important, in the first place, to understand the exact status of the Railway Company with reference to the State. The Union Pacific Railroad Company was incorporated in 1862 with power to build a road from the Missouri River west to a junction with the roads to be built east from California. At that time Nebraska was a Territory, and as such subject to the sovereignty of the United States. It was, therefore, competent for Congress in chartering the Company to reserve to itself control over the Company as extensive and particular as any State could do over a Railroad Company which it incorporated. Nor was the status of the Company in any wise changed or affected by the transfer of the sovereignty from the United States to the State of Nebraska upon its admission into the Union. All the functions, capacities, rights, and duties of the Company remain as they were originally defined and established. It is not a foreign corporation, as is a Company incorporated under the laws of one State and entering the territory of another to carry on its corporate operations therein. It is in the State by an authority paramount to it and independent of its control; at least, so far as that control has been reserved in its Charter.

We submit, therefore, that Congress reserved to itself control over the rates to be charged by the Company for the transportation of freight as well as passengers. The reservation may have been subject to a remote contingency; but that was a matter for the discretion of Congress, doubtless wise at the time. That, however, does not qualify the purpose to in-

sist upon the whole power of control over rates. That is as large as if the provision had been simply that Congress could fix them at its pleasure.

It need hardly be stated that the reservation to the United States of the power in any contingency and in any degree is incompatible with its exercise by the State. No man can serve two masters; and this Company cannot be subject at the same time to the United States and the State.

IV. We submit that it has been demonstrated that House Roll 33 is inoperative so far as the Union Pacific Railway Company is concerned. But that is not the whole reach and effect of the proposition which has been established; nor is it the more interesting aspect of the case.

The provisions of House Roll 33 apply to all railroad corporations doing business within the State of Nebraska, and include the Union Pacific, the Chicago Burlington & Quincy, the Chicago & North-Western, the Missouri Pacific, and the Elkhorn Companies. The federal corporation not being subject to the jurisdiction of the State in this respect, the result is that the Act is unconstitutional and void, not only in respect of that Company but in its whole scope and reach. It was beyond the competency of the Legislature to enact the law in the words of it, and therefore it must fall. The contention may be shortly stated thus: the Legislature said the provisions of this act shall apply to all Railroad Companies doing business in this State. This was more than it had power to say. It is of no consequence what it meant to say, or what it might have said; what it did say was an empty sound meaning nothing. Had it been content to say, this Act shall apply to all Railroad Companies not chartered by Congress, it would have spoken within its competency, and its words would have effect; but when it spoke in terms within whose circumscription are Companies chartered one by Congress and others by the Legislatures of the States, the whole provision falls.

United States v. Reese, 92 U. S. 214, was an indictment against two inspectors of a municipal election in Kentucky, for refusing to receive and count at such election the vote of William Garner, a citizen of the United States of African descent. The Fifteenth Amendment to the Constitution of the United States prevents States from giving preference to one citizen of the United States over another on account of race, color, or previous condition of servitude, and authorizes legislation by Congress to carry it into effect. Congress passed an Act providing for the punishment of any person who shall by threats, etc., hinder, delay, etc., any citizen from voting at any election. The terms of the section were general; there were no words of limitation, or reference confining its provision to unlawful discrimination on account of race, etc. As the statute went beyond the terms of the Constitutional Provision, it was, of course, void as to the excess, and the question was whether its general terms, which include proper matter of legislation, could be upheld to that extent. Mr. Chief Justice Waite, delivering the opinion of the Court, said: "We are not able to reject a part of the statute which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not; the proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. * * * To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one; this is no part of our business."

The *Trade-Mark Cases*, 100 U. S. 82, were indictments for counterfeiting the trade-marks of G. H. Mumm & Co., of Rheims, France, manufacturers and sellers of champagne wine. The Act of Congress extended to trade-marks used in both foreign and domestic commerce. It was contended that as the counterfeit was of a foreign trade-mark and therefore within the Constitution of the United States, and as the Statute covered such cases as well as trade-marks used in domestic

commerce, the Statute should be supported as to the former, although void as to the latter; and therefore the indictment could be sustained. Mr. Justice Miller, speaking for the Court, said: "It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. To this there are two objections:

"First, * * *

"Secondly, while it may be true that when one part of the statute is valid and constitutional, and another part is unconstitutional and void, the Court may enforce the valid part where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. * * *. If we should in the case before us undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely, make a trade-mark law which is only partial in its operation, and which would complicate the right which parties would hold in some instances under the Act of Congress and in others under State law."

Baldwin v. Franks, 120 U. S. 678, was *habeas corpus*. The petitioner had been arrested by the Marshal for California upon the charge of conspiring with others to deprive certain subjects of the Emperor of China of the equal protection of the laws and of equal privileges and immunities under the law. The indictment was under a statute of Congress, the terms of which were general, denouncing conspiracies to deprive any person of the equal protection of the laws. It was held unconstitutional, although Congress would have been

competent to have enacted a statute against conspiracies against aliens.

The same doctrine was applied in the *Virginia Coupon Cases*, 114 U. S. 269, 305.

Applying the doctrine illustrated by these cases to House Roll 33, its general provisions applicable to all railroads being unconstitutional as to the Union Pacific Railway Company, is void in its full reach and effect.

FOURTH POINT.

House Roll 33 is unconstitutional because it unjustly discriminates against certain of the roads in the State in favor of another.

The first section of the Act declares that "it shall apply to all Railroad Companies engaged in the transportation of freight within the State, and to all shipments of property from one point to another therein."

The third section prohibits each of the railroads within the State charging higher or greater rates than those fixed in the Act. The fourth section exempts from its provisions all railroads or parts thereof built since January 1st, 1889, or which may thereafter be built before December 31st, 1899. It appears from the pleadings and proofs that the Chicago Rock Island & Pacific Railway Company is, and for twenty years has been, a corporation organized and existing under the laws of the States of Illinois and Iowa, and owns and operates a railroad from Chicago in the former State to Council Bluffs in the latter; that between the first of January, 1889, and the first of January, 1891, it acquired the right to run its trains over the Union Pacific Railway Company's bridge and tracks between Council Bluffs and South Omaha, and built a railroad from South Omaha, by way of Lincoln to Beatrice, where it connects with another of its lines to Denver and is operating its

trains from Chicago by way of Council Bluffs, Omaha, Lincoln and Beatrice to Colorado points; that it is in close and active competition with the Union Pacific, Omaha & Republican Valley, Chicago Burlington & Quincy, and other Companies, and its line has many common points with the lines of those Companies; and that all these railroads serve the same communities, and seek from and do for them the same business, and have substantially equal facilities and ability to serve them. Under the operation of the Act, the Rock Island is left to charge and receive compensatory rates for the same service which the other Companies render, while they are not permitted to do so.

It has been an elementary principle of the civil polity of this country from the earliest period in its history, that all citizens stand upon an equal footing before the law. Equality of rights, privileges and capacities among all the people so far as they are granted by law has been the rule. Special privileges are not to be granted to nor special burdens imposed upon some members of the community. The State has neither favors to bestow nor injuries to inflict upon any of its citizens. As was said by the Supreme Court of Massachusetts as early as 1814, in *Holden v. James*, 11 Mass. 396, 405, "It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our Constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that any one should be subjected to losses, damages, suits, or actions from which all others under like circumstances are exempted." This principle of natural justice, which forbids discrimination by the State in favor of some of its members against others, has been applied in a great variety of cases. Thus, in *Bull v. Conroe*, 13 Wis. 238, 244, it was held that the general laws exempting property from seizure and sale on execution could not be varied for particular places and localities. So, too, in *Picquiet, Appellant, etc.*, 5 Pick. 65, it was held that a resolve of

the Legislature empowering a judge of probate to take an administration bond in a particular case, and in a mode differing from that described by the general laws, was unconstitutional. The same was held in respect of an appeal from a decree of the Probate Court in *Louis v. Webb*, 3 Greenl. 326, and in respect of a review upon a suit between private citizens, in *Durham v. Louiston*, 4 Ib. 140. Many other cases are collected by Cooley in his work on Constitutional Limitations, page 391, *et seq.* This general principle was not recognized by the Constitution of the United States until the adoption of the Fourteenth Amendment. At that time it was made a fundamental principle of Federal Jurisprudence, to be administered and enforced by the Federal Courts. That amendment, together with the one which precedes and the one which follows it, forms a new Magna Charta, under which the rights of every citizen are inviolable; and if infringed in any degree, anywhere, by any power, will be vindicated by the august Sovereignty of the nation. Heretofore the principle could be invoked only in the tribunals of the States; now it is made secure by Federal authority. (*Santa Clara Railroad Tax Case*, 9 Sawy. 165; 118 U. S. 394.)

In order to meet this objection it is pretended that the sections referred to, classify railroads in the State and that discrimination produced in that way is permissible. It is undoubtedly competent for the Legislature when establishing maximum rates of charge for the transportation of freight and passengers to classify them and prescribe one rate for one class and another for another. But the discrimination effected by that device must be based upon some reasonable principle, not upon an arbitrary distinction having no relation to the earnings or service of the Company. A discrimination based on the length of the several lines, or the amount of business done by them or other like differences, has been approved. (*Chicago Burlington & Quincy Railroad Company v. Iowa*, 94 U. S. 155, 163; *Dow v. Beidelman*, 125 U. S. 680.) But a discrimina-

tion having no relation to the earnings or service of the Company cannot be tolerated, any more than if certain rights are given to persons of one color, as whites in preference to blacks, or private individuals in preference to corporations, or members of one religious denomination in preference to those of another. If such distinctions are permissible, the Fourteenth Amendment is a myth and a delusion. Some of these Companies are called *railways* and some *railroads*. Statutes granting to those called railways immunities which are denied to those called railroads on account of this difference in their style cannot be justified. Some roads are operated by an officer called a General Manager; others by an officer called a General Superintendent; an act giving to one privileges withheld from the other on account of this difference classifies the roads but will not justify a distinction between them.

The Constitutions of many States forbid the enactment of special laws relating to certain subjects. Special acts have often been passed, the validity of which has been assailed because within this constitutional inhibition. The attack has been met by the contention that the statutes classified the subjects mentioned in the provision, and in that way avoided the constitutional provision. The question was presented in several cases whether the classification was a proper one.

The State v. Hammer, 42 N. J. L. 435, involved the question of a statute entitled "An act relating to the assessment and revision of taxes in cities of this State"; it declared that it should apply to any city where a Board of Assessment and Revision of Taxes now exists. It appeared that there were but two cities within that description. It was argued in support of the act that all the group of objects having characteristics sufficiently marked to distinguish them as a class, answered the constitutional provision. Beasley, C. J., delivering the opinion of the Court, said: "The true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which

thus serve as the basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction having a reference to the subject-matter of the proposed legislation between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such in the nature of things as will in some reasonable degree at least, account for or justify the restrictions of the legislation." In *The State v. The City of Trenton*, 42 N. J. L. 486, the statute provided that it should be lawful for any city within the State having a population of not less than 25,000 inhabitants, and a floating debt which the available funds of such city will not be sufficient to pay, could borrow the money to the amount of such indebtedness and issue bonds therefor. The Common Council of the city of Trenton passed an ordinance for the issue of bonds to fund its floating debt, by virtue of these provisions. A citizen and taxpayer sued out a writ of certiorari to test the legality of the corporate proceedings, contending that the statute was special and local, and contravened the constitutional provisions above referred to. It was held in the first place, that the classification of towns was proper, and that an Act relating to one class was not within the constitutional prohibition, but that such prohibition required that some limit should be placed upon its exercise, so as to exclude special and local legislation. Dixon, J., said on this subject: "Hitherto, this limit has been declared to exist in the principle that the class to be affected must consist of individuals distinguished by some important characteristic to which the purpose of the law relates, and must embrace all those so characterized. * * * But any attempt to legislate for a group of cities not classified in harmony with this principle, is, as I understand, declared to be evasive and in violation of the fundamental law. (*Rutgers v. New Brunswick*, 42 N. J. L. 51; *Skinner v. Collector*, Ib. 407; *State v. Par-*

sons, 40 N. J. L. 1; *State v. Herman*, 75 Mo. 340; *State v. Miller*, 100 Mo. 439.)

The Constitution of Pennsylvania provided that no local or special Bill should be passed, unless notice of the intention to apply therefor shall have been published, etc. In *The Commonwealth v. Patton*, 88 Pa. St. 258, the Statute provided, in order to individualize a city and county, that in any counties with a population of 60,000 inhabitants, in which there was a city with a population exceeding 8,000, situated from the county seat more than twenty-seven miles, a Court for civil and criminal business could be held for one week in every year. The Court characterized the provision as "classification run mad." In appeal of Ayars, 122 Pa. St. 266, it was said, "The underlying principle of all cases is that classification with the view of legislating for either class separately is essentially unconstitutional unless a necessity therefor exists. A necessity springing from manifest peculiarities, clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class separately that would be useless and detrimental to the other * * * Classification which is grounded in no necessity and has for its sole object an invasion of the Constitution, is quite a different thing."

The very recent case of the *Pittsburgh Fort Wayne & Chicago Railway Co. v. Martin, County Treasurer*, 53 O. St. 386, gives us the latest expression of the Supreme Court of the State of Ohio on this subject. The Act in question related to "any City of the fourth grade of the second class, which at the federal census of 1890 had a population of not less than 5,750 and not more than 5,800, or which at any subsequent federal census shall have such population." The Court said of this Act, "When an Act is manifestly intended to, and does, in fact, at the time of its passage, apply to only one of a given class consisting of many, it is special," and therefore unconstitutional.

These cases illustrate the general principle that classification, if founded on pertinent and just distinction, is proper; but if founded on specious and illusive distinctions, is vicious. If this principle avoid the statute which contravenes a constitutional provision against special legislation, how much more will it have that effect when the very highest rights of the citizen and fundamental principles of personal liberty are involved?

The distinction made in House Roll 33 between the Rock Island Company on the one side and the other Companies on the other, based simply upon the time of their construction, is arbitrary and not justified by any substantial difference. The fact that the Rock Island Company completed its road within a period of two years before the passage of the act, has no more to do with its earnings, or its ability to make earnings, or to serve the public, than the fact that it styles itself a railway instead of a railroad. It is impossible to resist the conviction that it was exempted from the severities of this Act by those unreasonable prejudices and passions which seem to have dominated the Legislature.

FIFTH POINT.

This case is within the jurisdiction of the Court, whether it be considered as a Court of the United States or as a Court of Equity.

I. House Roll 33 fixes the rates of charge of railroads absolutely and arbitrarily. It neither permits a company complaining that the Act operates upon it oppressively to present the question to the courts for judgment, nor plead or prove the unreasonableness of the rates fixed by it in defense of an action brought under section 8, nor of a prosecution under section 9. No words can be more precise or emphatic than those

of section 2, which provides that any other or different classification of freight than that made therein is prohibited and declared to be unlawful, the effect of which classification shall be to raise the rates above those prescribed in the Act. The same is true of the language of section 3 which in terms provides that no higher or greater rates than those fixed therein shall be charged by any railroad in the State.

A pretense of judicial investigation is made in section 5, but it is transparent. That section appears to provide for an action in the Supreme Court of the State by a company as plaintiff against the State as defendant, and that if the Court becomes satisfied that the rates fixed by the Act are unjust so far as they relate to the complaining Company, it may order the Board of Transportation to permit such Company to raise its rates to any sum in the discretion of the Board, but not above those charged by it on the first of January, 1893. And section 6 authorizes the Board to reduce rates whenever it shall seem just and reasonable to a majority of its members, and also to revise the classification established in the Act when the majority of the Board shall think it just and reasonable to do so, but not so as to increase the rates. This Act is obnoxious to several objections.

1. In a process instituted under these sections, the State is the sole defendant, and yet it has no pecuniary interest in the contention; it is not the party which pays the rates and is not concerned in the question whether they be high or low. The fact that as a sovereignty the State is concerned in the execution of its laws does not give it such an interest in the proceeding as every party must have in order to be liable to a civil action. To be sure, the Constitution provides that the State may sue and be sued in its Supreme Court, but this does not render it amenable to a civil action in which it is not concerned in its corporate capacity.

In re the petition of the Attorney General, etc., 40 Neb. 402-410, the Supreme Court, speaking by Ryan, C., said: "The

original jurisdiction conferred upon this Court by the Constitution * * * will not be entertained by this Court where the State is but a nominal party; the case must be such that the State as a real substantial party has a direct interest in having it determined. This interest must be made to appear not merely by the title of the action, but it must be shown by facts clearly pleaded." In the process defined in the Act the State is not the real substantial party. That party is the shipper or the body of shippers. Nor has the State a direct interest in having the question determined whether the rates limited by the Act are just and reasonable. Its treasury is neither replenished by low rates nor depleted by high rates.

2. Even if the Court had jurisdiction of the process prescribed by the Act that process is altogether inefficient, for it does not result in a definitive judgment. All that the Court is authorized to do is to issue an order to the Board of Transportation directing it to raise the rates to such sum as the Board in its discretion may limit. This converts a Court competent to render a final judgment into a commission of preliminary inquiry. It reserves to the Board the power of determination.

3. If we pass from a consideration of the want of competency of the Court to definitively answer the question whether the statutory rates are reasonable to that of the powers of the Board, another objection appears. When the Board has received from the Court an order to raise the rates, it acts without hearing the complaining Company or investigating the question in any judicial way; what it shall do, is a matter committed to the discretion of a majority of its members. This brings the Act within the condemnation of *The Chicago & North-Western Railway Company v. Minnesota*, 134 U. S. 418. The Legislature of that State established a Commission, and in effect provided that rates of charges for the transportation of property recommended and published by the Commission, should be final and conclusive as to what are equal and reasonable charges

and precluded any judicial inquiry as to the reasonableness of such rates. The Commission having established certain rates, and the Company affected thereby disregarding its order, an application was made to the Supreme Court of the State for a mandamus to compel obedience of the order.

Mr. Justice Blatchford, delivering the opinion of this Court, said that the Act was unconstitutional because "it deprived the Company of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad Commission which, in view of the powers conceded to it by the State Court, cannot be regarded as clothed with judicial functions or possessing the machinery of a Court of Justice."

That language accurately describes the functions of the Board of Transportation of the State of Nebraska.

There is one limitation upon the discretion of the Board, which is that under no circumstances shall it permit the rates to be raised above what the company charged on the first of January, 1893. On that day a company may have charged rates which did not yield cost of the services, saying nothing about compensation for the use of its property. Nevertheless, rates on that day, no matter whether they yield cost or not, or whether they are reasonable or unreasonable, just or unjust, are made absolute without any way open to the company to relief.

Section 6 also provides that the Board may reduce rates on any class or commodity whenever it shall seem just and reasonable to a majority of the Board. This, too, commits to the uncontrolled discretion of three out of five members the plenary power to reduce rates on any railroad without a hearing and without a word of notice. This section is also liable to the same objection which has been shown to lie against the other provisions of the Act.

II. It is contended that these Bills in their substance make a case against the State of Nebraska and are therefore within the Eleventh Amendment of the Constitution of the United States, which is as follows: "The judicial power of the United States shall be construed to extend to any suit in law or equity commenced or prosecuted against any one of the United States by citizens of another State or by citizens or subjects of any foreign State."

The same objection has been made in many cases. The discussion begins at an early day and has continued through many elaborate opinions of this Court. Every distinction and every proposition that could be raised seems to have been carefully determined.

For the purpose of relieving the debate as much as possible, we admit many propositions.

1. The State is not liable to suit in the Federal Courts, and the general appearance of defendants in such suit does not waive the exemption.

2. The question is not to be determined simply by reference to the parties upon the record; if the bill be in form against the officers of the State, but in effect against the Sovereignty, it is not within the jurisdiction of the Federal Courts.

3. Whether the bill be against the officers of the State as individuals, or against them in their official capacity representing the Sovereignty, is to be determined by the nature of the relief sought; if the decree prayed for shall operate upon the rights or property of the State in its corporate capacity, the bill is not within the jurisdiction.

4. Nor is the bill within the jurisdiction if the prayer be for the affirmative action of the State officers in their official capacity.

The contention is reduced to the case of a bill to restrain acts of the State officers, threatened by them under an authority claimed under an Act alleged to be unconstitutional. Such a bill is not against the State, nor against the officers in their

official capacity, but against them as individuals. Fortunately we are relieved of the labor of tracing the course of the adjudications and any examination of them by a recent decision.

Pennoyer v. McConnaughy, 140 U. S. 1, was a bill in equity, filed in the Circuit Court for the District of Oregon, by McConnaughy, a citizen of California, against the Governor Secretary and Treasurer of Oregon constituting the Board of Land Commissioners of that State. The case was this: In 1860 Congress granted to the State the swamp and overflowed lands within its borders. In 1870 the Legislature passed an Act providing for the selection of these lands, and for their sale by a commission appointed for the purpose. Twenty per cent of the purchase price was to be paid at a certain time. Payment of the balance and also proof of reclamation of the land were to be made within ten years thereafter; in default of which the land was to revert to the State and the money paid be forfeited.

By an act of 1878 the Board of Commissioners for the sale of school and university lands, which consisted of the Governor, Secretary and Treasurer, was authorized to sell the lands, and declares that all applications for the purchase of any of them previous to the Act should be void when the same were not regular and the applicants had not complied with the law and paid the twenty per cent. In 1887 another Act was passed declaring void all certificates of sale issued by the Commissioners on which twenty per cent was not paid prior to January 17, 1879, and for the sale of all such forfeited lands.

Prior to October, 1878, in pursuance of the Act of 1870, Henry B. Owen regularly applied to purchase certain of these lands and within the time limited paid the required twenty per cent. The plaintiff was his mediate grantee. The defendants, as the Board of Land Commissioners, alleged that the certificates to Owen were void because he did not pay

twenty per cent of the purchase price before January 17, 1879, and ordered that the lands had reverted to the State. The bill stated these facts and insisted that the defendants were acting without authority of law, and that the Act of 1887 was void because it impaired the obligation of the contract of the State with Owen.

The defendants demurred on the ground that the suit was in effect one against the State and therefore not within the jurisdiction of the Court.

Mr. Justice Lamar delivered the opinion of the Court reviewing many of the prior judgments and sharply distinguishing the two classes of cases; one of which is where the suit is brought against the officers representing the State, and the other against them claiming to act as such officers and under the color of an unconstitutional statute, and threatening to commit acts of wrong and injury to the rights and property of the plaintiff. This case has been affirmed and followed in *In re Tyler*, 149 U. S. 164, *Belknap v. Schild*, 161 U. S. 10, and *Scott v. Donald*, current term.

Here, as in the case cited, the appellants threaten to do certain acts in their character as officers of the State; they allege as their authority an Act of the Legislature; against them it is asserted that the act is unconstitutional and therefore furnishes no justification of their threatened action. If this be so, they will proceed without authority of law and under the guise and shelter of their official character will be trespassers.

Several cases precisely like this have been supported against the objection which we have been considering.

The Louisville Railroad Co. v. The Railroad Commissioners of Tennessee, 17 Fed. R. 678.

The Farmers' Loan & Trust Company v. Stone, 20 Ib. 270.

The Chicago & Northwestern Ry. Co. v. Dey, 35 Ib. 866.

III. The jurisdiction is questioned on another ground; it is charged that the plaintiffs in these bills and the officers and directors of the Companies have conspired together and contrived these cases within the implied prohibition of the 94th Rule in Equity. To this there are two answers:

1. Jurisdiction of these bills does not rest upon the citizenship of the parties. One is a bill filed by the Union Pacific Railway Company; and, because that Company is a federal corporation and liable to suits in federal courts by virtue of express provisions of the charter, the Circuit Court had jurisdiction. And that Company and the others in this series of suits, could have maintained bills in their own names on another ground. They all rest upon provisions of the Constitution of the United States, and are, therfore, within the grant of jurisdiction contained therein and in the acts of Congress. If the Companies themselves could maintain these bills on that ground, their respective stockholders could also do so. The bills allege all of the matters required by the 94th Rule, and are supported by proofs. The plaintiffs in each bill called the attention of the Presidents of their respective Companies to the Act, and pointed out some of their objections to it. The President of the Union Pacific and the Burlington Companies presented the matter to their directors, who took the same into consideration but found themselves confronted with a most serious question: whether, on the one hand, they should submit to the rates which must work grievous wrong to their Companies, or, on the other, to incur the awful risks of the penalties denounced by the Act. These penalties were, that for every act done caused or permitted to be done by the Company, prohibited or declared unlawful by the Act, namely, charging and taking higher rates of compensation than are fixed by it, and for every act omitted by the Company which the Act required, fines should be imposed for the first offense, of from one to five thousand dollars, and thence up to twenty-five thousand dollars for subsequent

offenses. Every act of transportation, even of the smallest article and the least value, for which the compensation fixed by the Act is not a cent a mile, may subject the Company to these unusual, enormous and disproportionate penalties. Count all such acts along the whole line of road in one day, if that be possible, and you have a number so great that multiplied by these penalties the sum of them all exceeds the value of the whole property. I say count the acts of the transportation in one day and you reach these appalling results; I may rather say count them in one hour, yes, in one instant of time on the whole line, and the penalties incurred all amount to a sum hardly short of the value of the property. It is not strange that the directors stood aghast; the responsibilities which they would assume by declining to put the act in force were too great. What could they do but submit to the less evil? The Legislature knew this; it imposed these enormous penalties not for the purpose of justice, but to intimidate coerce and browbeat these Companies and their managers. The Directors did not dare take the responsibility and risk and they felt themselves compelled to submit to the outrage without the poor right of applying to a Court for relief. How, then, can it be said that when the Directors refused to follow the lead of their Stockholders, they did so collusively? They could not do anything else. The Legislature had shorn them of all power of choice. Only one thing remained; submission to the wrong. Collusion was out of the question. The Stockholders of the Northwestern made the proper application to Mr. Hughitt, the President of that Company, but he had not time to call his Directors together and took no steps in the matter.

But that did not leave the stockholders of these Companies remediless; they could take their share of responsibility and come into the federal courts for relief against the officers of their Companies, and against the officers of the State. The men who had contrived this statute were disappointed; they

were defeated of their iniquitous purposes. The law will be vindicated. The rights which the Constitution of the United States guarantees to every citizen will be observed.

J. M. WOOLWORTH,
Solicitor for Appellee, and of Counsel.

APPENDIX I.

Commentaries on points in the brief for the appellants, which are not material or relevant to these cases, enumerated at pages 45 and 46 of this brief.

I.

1. It is said by the appellants that the statistics show that in 1890 the number of tons of freight carried by the railroads of the United States was 636,541,617, (p. 29 of brief.) The report of the Interstate Commerce Commission for that year (p. 59) says that "the total number of tons of freight carried was 539,639,583." The appellants also say that for carrying this freight the roads charged $736,793,699. These charges are said to be "an enormous tribute paid by the people of this country to transport the product of the land from the producer to the consumer." This is one of those false, deceptive and mischievous expressions which have inflamed the prejudices of certain classes and made them believe that they are oppressed by the railroads without cause.

In the first place, these charges for railroad transportation are not a tribute. Only a comparatively small share go to the owners of the roads. The operating expenses of them are, on the average, 68 per cent of the earnings. All this sum is expended in the regions through which the roads run. What this amounts to is illustrated by the number of men employed in operating the roads. That number was in 1892 812,415. These men, with their families, live along the road, expending there a large part of their earnings. The money received

by the road for transportation is expended by it among those who pay it. It is like the rain formed by moisture drawn from the earth, which falls again to refresh and fertilize the soil. Besides operating expenses incurred and paid out in the regions through which the roads run, large sums are paid to the cities, counties and States for taxes; sums greatly larger than are paid on other invested capital. Nor is the sum earned by the Companies tribute in any sense: it is a price paid for a service. The service is as necessary to those to whom it is rendered, as the farmers' produce to those it feeds. The railroad and the producer are necessary one to the other. Neither pays tribute to the other.

This vicious expression also implies that the charges of the roads are exclusively for transportation of the product of the land from the producer to the consumer. Agricultural products furnish a large part of the freight carried by railroads, but by no means all of it; not one-half of it, perhaps. "Man does not live by bread alone." The phrase, "enormous tribute paid by the people for the transportation of the product of the land," was well contrived to stimulate in the agriculturalist a sense of his importance and making him feel that he is hardly used by the roads.

It is also said that the stock of the roads in 1890 was $4,409,658,485 and their bonded indebtednesses are $4,594,576,131. These figures are inaccurate. The former should be $4,251,190,719 and the latter $4,267,527,859. These figures are deceptive. $2,621,439,792, or 61.67 per cent of the whole amount of the stocks, paid nothing whatever to the owners of the property; $91,842,070 paid from 1 to 2 per cent; $66,470,311 paid from 2 to 3; and $127,700,779 from 3 to 4. (Statistics of Railways for 1890, p. 49.) Of railroad bonds, $775,851,795, or 18.19 per cent of the whole, paid nothing; $24,125,836, or .56 per cent of the whole, paid under 1 per cent; $47,998,840, or 1.13 per cent, paid from 1 to 2; $88,341,990, or 2.07 per cent of the whole, paid from 2 to 3; $297,371,502, or 6.77 per cent

of the whole, paid from 3 to 4. It only confuses the subject to put the stock of the road at a high figure when over two-thirds pays nothing or next to nothing.

2. Not less gross are the exaggerations in which the appellants indulge when pretending to state what the people of Nebraska pay the roads.

In the first place there is nothing in this record or any public statistics showing that the Rock Island, Sioux City & Western, Missouri Pacific, Sioux City Pacific, Kansas City & Beatrice and Kearney & Black Hills Railroad Companies received six millions or any other sum. It is therefore a gratuitous assumption that "if these lines were included in the computation 'the freight hauled within the State of Nebraska in 1893 would aggregate about $20,000,000, or about $20 for every man, woman and child or $100 for ever elector in the State. And it is not reasonable to suppose that if the great lines earn only $14,460,669 these other roads, most of them short lines and others recently built, earn nearly $6,000,000 or almost half as much.

In the second place, eighty-five per cent of the business of the Union Pacific, seventy-eight and seventy-three hundredths of the Burlington and seventy-five and fifty hundredths per cent of the Elkhorn is interstate business. A very large part of this is traffic going through the State to the carriage of which the people of Nebraska do not contribute one dollar. The rest is traffic coming into the State from other States and traffic going from the State to other States, for which the people of the State of Nebraska contribute not more than one-half the charges. All the local freight earnings of the roads of which we have statistics in 1893 were $2,346,874. A reasonable allowance for what the people of the State pay on other traffic would perhaps bring it up to $5,000,000, one-third of what the appellants say they pay. It is by such methods that the extravagant claims are supported that the people of Nebraska pay an enormous tribute to the roads.

II.

It is said that it appears from a table taken from the Interstate Commerce Commission, Volume of Statistics for 1890, that roads in Group VII, which Nebraska is in, have a revenue per ton of freight per mile of 1.360 cents, while the average cost is .713, and that the net is 90 per cent. The absurdity of any road making 90 per cent net does not call for remark. The net on the 1.360 earnings and .713 cost is 47 per cent instead of 90. Why the statistics for 1890 should be taken for this purpose, is not apparent, unless they answered the purpose of the appellants better than those of other years. It would seem that the year 1892, which the other witnesses took, is the more proper one, or else that the year of the hearing in the Circuit Court, or the last one for which the Commission has issued a volume, should be taken. It will present the whole matter to give the figures for all of the years from 1890 to 1895, the last for which the Commission has given them:

Year.	Revenue.	Cost.	Net.
1890	1.360	.713	.647
1891	1.217	.814	.403
1892	1.293	.708	.585
1893	1.212	.728	.474
1894	1.141	.770	.371
1895	1.098	.736	.362

From 1890 to 1895—six years—the earnings per ton per mile decreased; the cost varying, but with one exception increasing, in proportion to earnings every year, while the net fell almost one-half.

The singular fact is to be noticed that in all the Commission Statistics no account is taken of taxes. Besides, the cost is calculated on all the business of the roads without taking into account the extra cost of local business. If these items were taken into account, the cost would be much greater and the net much less.

III.

A most inexplicable mistake is made by the appellants in stating the reductions of all the earnings of the roads made by House Roll 33. They are stated to be as follows:

B. & M. R. R. R.	4.2 per cent.
C. St. P. M. & O.	4.5 per cent.
F. E. & M. V.	4.1 per cent.
U. P. Ry	2.0 per cent.
O. & R. V.	1.9 per cent.
St. J. & G. I.	2.7 per cent.
K. C. & O.	1.5 per cent.

In Dilworth's table on page 932 for 1892, they are as follows:

Name of road.	Per cent of reduction on all business done in the State by House Roll 33.
B. & M. R. R. R. in Neb.	.044
C. St. P. M. & O.	.047
F. E. & M. V.	.047
U. P. Ry.	.022
O. & R. V.	.022
St. J. & G. I.	.030
K. C. & O.	.011

In his table on page 977 they are, for 1891 and 1893, as follows:

Name of road.	Per cent of reduction on all business done in the State by House Roll 33.	
	1891.	1893.
B. & M. R. R. R. in Neb.	.05	.042
C. St. P. M. & O.	.044	.045
F. E. & M. V.	.036	.041
U. P. Ry.	.015	.020
O. & R. V.	.025	.019
St. J. & G. I.	.024	.027
K. C. & O.	.018	.015

IV.

It is said that the rates of the roads in Nebraska are higher than in adjoining States. To prove which, reference is made to Exhibit B attached to the bills. In this Exhibit the rates fixed by the Act are called "Newberry rates." A few instances are selected out of the vast number in the table where this is

true; but a casual glance at all of them shows that almost invariably rates in Wisconsin, Dakota, Minnesota and Kansas are very much higher than those allowed by the Act. The exceptions prove the rule.

In order to show that the rates in Nebraska are higher than those from the Missouri River to Chicago, it is said that on shipments from interior points, say, Fremont, to Chicago, the Nebraska road gets a very large proportion of the through rate. Thus, the rate on corn from Fremont to Chicago is 22; of which the Nebraska road gets 9, and the Chicago road 12, when the former is only 50 miles long and the latter 500. A like division is made of earnings on all freight. The same is true of all points on a north and south line from Blair through Fremont, Wahoo, Lincoln, Beatrice, etc.

In the cases of the Northwestern and the Burlington, there is no significance in the fact. As the Northwestern owns the lines from Fremont to Chicago, operating those east of the River in its own name and those west of the River in the name of the Elkhorn or the Sioux City & Pacific, for the sake of convenience of management and accounting, it may divide the common earnings as it pleases; and whatever division it makes does not show what the separate lines actually earn. And the same is true of the Burlington. It owns a line from Lincoln to Chicago, crossing the River at Plattsmouth. West of the River it does business in the name of the Burlington & Missouri River, and east of it in that of the Chicago, Burlington & Quincy; but all are parts of one system of roads and are owned and operated by one company. It may divide the earnings east and west of the River on any basis, but whatever that basis is, it does not show what is earned on one side and what on the other. This is all made perfectly plain by Mr. Utt and Mr. Randall; and yet the appellants assume that the division which the Companies make of their earnings is according to service rendered, and from this fact it is inferred that large earnings were made in Nebraska.

Mr. Randall (632) shows there is more or less reason in the arbitrary apportionment made by the roads of their interstate business, because in Nebraska the road in gathering the freight does a local business, while shipments east of the River are through. It is one thing to load a train with freight, some at Lincoln or Fremont, some at each intermediate station until it reaches the River, and to send the train through from the River to Chicago. But it is not material why the the roads divide their earnings on one basis or another. The appellants pervert the facts of through business when they apply them to local business.

V.

The appellants insist that the roads make rates on a false theory. The facts involved in the operation of making rates by the roads are shortly stated by us under the second point of the brief. Those facts were deduced from the testimony of Mr. Fink and Mr. Utt. They show that rates are not made by the roads or their agents, but are the results of forces which are beyond their control and which dominate them. When the roads submit themselves to the operation of those forces, their rates are necessarily reasonable. It is said that Mr. Fink and Mr. Utt do not base reasonableness of rates on cost, and therefore their theory is wrong. Mr. Fink says the road will make rates which will yield cost if it can; but both he and Mr. Utt say that cost is not otherwise considered. From which it follows, first, that if a particular class of freight will not pay cost, the road will carry it without counting cost; and, secondly, if a particular class of freight will pay much more than cost, the road will not limit its charges by the consideration of cost. No one will object to the first deduction: everybody seems quite willing that the roads shall do business for nothing. Nor if the road does some business at a loss, should the objection be made to making itself whole out of business that will

bear high rates. That is all that can be made out of the testimony, when the witnesses, enumerating the considerations upon which tariffs are formulated, either do not mention cost or give it a subordinate place in the calculation. That is all that Mr. Fink means when he says the freight agent does not know any more about cost than the man in the moon. A commercial man dealing upon commercial principles, he fixes his rates to get the business.

VI.

The appellants attempt to show that the roads are guilty of discrimination against Omaha and towns and villages in the western parts of the State in favor of Fremont, Lincoln, etc. This is done by comparing the rates on interstate shipments with those on local business. Thus it is said a shipment from Chicago to Lincoln is made by adding to the rate from Chicago to Omaha a small differential for the reach of road from the river to Lincoln. But as the rate, however made, is one rate from Chicago to Lincoln, the differential is not charged from Omaha to Lincoln; there can be no apportionment of it. Then taking the amount of the differential as if it were the charge on a shipment from Omaha to Lincoln, it is compared with charges on local freight.

It is not pretended that there are any differentials in local traffic. Extravagant results are reached by applying to it the methods of the roads on interstate business.

VII.

It is quite useless to trouble ourselves about the capitalization of the Union Pacific, for in the calculations in the brief nothing was taken into account but the first mortgage and the requirements of the Thurman Act, which charges were authorized and enforced by Acts of Congress.

The case of the Burlington is very simple. Mr. Taylor (1299) says its lines in Nebraska cost $74,616,526.02, which justifies capital and bonds attributable to roads in Nebraska to their total amount. The fact that from 1885 to 1891 stock dividends were made, standing by itself, does not show fictitious capital. The property of a road may by increment acquire a value which will justify a stock dividend just as a farmer may value at $10.00 per acre land he bought from the Government at $1.25 per acre. A company may hold in its treasury funds fairly applicable to dividends and make stock dividends. So, too, it may make a dividend of part of its earnings and against the rest make a stock dividend. It is necessary, therefore, to go beyond a stock dividend in order to show fictitious capital.

There is no proof to support the charge of over capitalization of the Northwestern, or of stock dividends or of fictitious stock. It is affirmatively proved that the amount of capital and bonds of the Elkhorn was fairly expended in its construction.

APPENDIX II.

Showing the Errors in the Figures and Calculations of the Appellants.

In attempting to show the effect of House Roll 33, the process of the Appellants applied to the Burlington is this: the earnings of that road on local freight, as given by Mr. Taylor and Mr. Randall, were $1,853,036.59; to get 29½ per cent of this sum, the Appellants divide it by 1.295, thus:

```
1.295 ) 1,853,036.59 ( 1,430,916.28
        1 295
        ------
          558 0
          518 0
          -----
           40 03
           38 85
           -----
            1 186 5
            1 165 5
            -------
              21 09
              12 95
              -----
               8 140
               7 770
               -----
                3700
                2590
                ----
                11100
                10360
                -----
                  7400
```

This is said to give $1,430,916.28 as what the earnings would have been, had the Act been in force, and if this be deducted from the actual earnings, thus:

Actual earnings	$1,853,036.59
Earnings under the Act	1,430,916.28
We have the amount of reduction caused by the Act	$422,120.31

The correct process is that stated by us in our brief, as follows: Earnings under Company's rates, $1,853,036.59. The reduction caused by the Act is 29½ per cent. The reduction

of one per cent is found by dividing the actual earnings by 100, thus:

```
100 ) 1,853,036.59 ( 18,530.36
      1 00
      ----
        853
        800
        ---
         53 0
         50 0
         ----
          3 03
          3 00
          ----
            36 5
            30 0
            ----
             6 50
             6 00
             ----
              509
              500
              ---
                9
```

This method of computation is never used because it is simpler to carry the decimal forward two figures. Each way gives one per cent of the earnings; twenty-nine and a half per cent is twenty-nine and a half times one per cent, thus:

One per cent	18,530.36
Multiplied by	29½
	9,265.18
	166,773.24
	370,607.2
Gives reductions	546,645.62
From total earnings	$1,853,036.59
Subtract amount of reduction	546,645.79
We have statutory earnings	$1,306,390.80

Returning to the figures of the appellants; they—

Deduct from what they claim the earnings under the Act would have been	$1,430,916.28
The cost of local freight	1,221,742.84
Gives net earnings under the bill	$209,173.44
We deduct from the earnings at statutory rates	$1,306,390.80
Cost of local freight	1,221,742.84
Gives net earnings at statutory rates	$84,647.96

The difference in the result of the two processes is found by deducting from what the appellants claim to be net earnings at statutory rates what we have shown, thus:

Appellants' figures	$209,173.44
Our figures	84,647.96
Difference	$124,525.48

In attempting to show the effect of House Roll 33, the process of the appellants applied to the Union Pacific is this: the earnings of that road on Nebraska freight as given by Van Kuran are $4,313,204.46, of which 15 per cent is local freight. The appellants find that per cent by dividing all freight by 115, thus:

```
115 ) 4,313,204.4600 ( 3,750,612.57
      3 45
      ----
        863
        805
        ---
         58 2
         57 5
         ----
           704
           690
           ---
            14 4
            11 5
            ----
             2 96
             2 30
             ----
              660
              575
              ---
               850
               805
               ---
                45
```

The appellants assume that the result is 85 per cent of the total earnings not affected by the Act; and by deducting it from the total earnings gives the reduction caused by the Act thus:

Total earnings	$4,313,204.46
Less 85 per cent not affected by Act	3,750,612.57
Gives amount upon which the bill operates	$562,591.89

It is said that this sum $562,591.89 is 1.295 per cent of what it would have been had House Roll 33 been in force during 1892. The result is said to be $419,906.25 as the gross earnings upon freight shipped from points in Nebraska to points in Nebraska.

The process by which this sum is reached, is this: dividing $562,591.89 by 1.295:

```
1.295 ) 562,591.89000 ( 434,433.89
        518 0
         44 59
         38 85
          5 741
          5 180
            561 8
            518 0
             43 89
             38 85
              5 040
              3 885
              1 1550
              1 0360
                11900
                11655
```

This shows that the appellants are inaccurate, as they give the result as $419,906.25. Those figures, instead of the correct ones, are said to be the gross earnings on local freight. This deducted from amount of the sum on which the bill operates thus:

Amount on which bill operates	$562,591.89
Less gross earnings on local freight	419,906.25
Gives reductions caused by the bill	$142,685.64

If the correct amount of gross earnings on local freight be taken the result is this:

Amount on which bill operates	$562,591.89
Less gross earnings on local freight	434,433.89
Amount of reductions	$128,158.00

The correct process is this:

Total freight earnings in the State being $4,313,204.46, and local freight earnings being 15 per cent of that sum, we take $4,313,204.46 and move the decimal point forward two figures to get one per cent, and multiply that by 15, thus:

Total freight earnings	$4,313,204.46
One per cent	43,132.04
And multiply that by	15
	215,660.20
	431,320.4
Amount of local business	646,980.60

Reductions 29½ per cent of above is found by moving the decimal point two figures forward and multiplying by 29½, thus:

Amount of local business	$646,980.60
One per cent is	6,469.80
Multiplied by	29½
	3,234.90
	58,228.20
	129,396.0
Result	$190,859.10

If we correct the figures of the appellants purporting to give the amount of gross earnings on local freight, taking $434,-433.89 instead of $419,906.25, as showing reductions $128,-158.00 instead of $142,688.99, the difference in the results appears thus:

True amount of reductions	$190,859.10
Amount of appellants' method	128,158.00
Difference	$62,701.10

Another calculation of the appellants is as follows:

Whole freight earnings in the State	$4,313,204.46
Deduct decrease caused by bill	142,688.99
Gross earnings within State under bill	$4,170,515.45
Deduct total freight and operating expenses	2,501,935.00
Net freight earnings within State	$1,688,580.45

APPENDIX III.

AN ACT to regulate railroads, prevent unjust discrimination, provide for a Board of Transportation, and define its duties, and repeal articles 5 and 8 of chapter 72, entitled "Railroads," of the Revised Statutes, and all Acts and parts of Acts in conflict herewith.

Be it enacted by the Legislature of the State of Nebraska:

SECTION 1. That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property by railroad, under a common control, management, or arrangement, for a continuous carriage or shipment from any point in the State of Nebraska to any

other point in said State. The term "railroad," as used in this Act, shall include the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and the term "transportation" shall include all instrumentalities of shipment or carriage. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivery, storage, or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

SEC. 2. That if any common carrier, subject to the provisions of this Act, shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive, from any person or persons a greater compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives, from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. That it shall be unlawful for any common carrier, subject to the provisions of this Act, to make or give any preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any prejudice or disadvantage in any respect whatsoever. Every common carrier, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and

for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such contracting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

SEC. 4. That it shall be unlawful for any common carrier, subject to the provisions of this Act, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance.

Provided, however, That upon application to the Board appointed under the provisions of this Act, such common carrier may, in special cases, after investigation by the Board, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Board may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this Act.

SEC. 5. That it is unlawful for any common carrier, subject to the provisions of this Act, to enter into any contract, agreement, or combination, with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

SEC. 6. That every common carrier subject to the provisions of this Act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this Act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force upon such railroad, and shall also state separately the terminal charges and any rules or regulations whi in any wise change, affect, or determine any part of the regate of such aforesaid rates and fares and charges. Such schedules shall be printed in large type, of at least the size of ordinary pica, and copies for the use of the public shall be kept in every depot or station upon any such railroad, such places and in such form that they can be conveniently inspected. No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier, in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time made in the schedule then in force and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules then in force at the time and kept for public inspection. Reductions in such published rates, fares or charges may be made without previous public notice; but whenever any such reduction is made notice of the same shall be publicly posted, and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedule at the time in force and kept for public inspection. And when any such common carrier shall have established and published its

rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater compensation for the transportation of passengers or property, or for any services in connection therewith than is specified in such published schedule of rates, fares and charges as may at the time be in force.

SEC. 7. That every common carrier subject to the provisions of this Act shall file with the board hereinafter provided for copies of its schedules of rates, fares and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said board of all changes made in the same. Every such common carrier shall also file with said board copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party, and in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariff shall also, in like manner, be filed with said board. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said board, in so far as may, in the judgment of the board, be deemed practicable; and said board shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such parts of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published; but no common carrier party to any such joint tariff shall be liable for the failure of any other common carrier party thereto, to observe and adhere to the rates, fares, or charges thus made and published.

If any such common carrier shall neglect or refuse to file or

publish its schedule of rates, fares and charges, as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any district court in the judicial district wherein the principal office of said common carriers is situated, or wherein such offense may be committed, to compel compliance with the provisions of this act, and such writ shall issue in the name of the State on the relation of the board provided for in this act, and a failure to comply with its requirements, shall be punishable as and for a contempt; and the said board as complainants may also apply in any court of competent jurisdiction for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section.

SEC. 8. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract or agreement, expressed or implied, to prevent by change of time schedule, carriage in different cars, or by any other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freight from being treated as one continuous carriage from the place of shipment to the place of destination unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any provisions of this Act.

SEC. 9. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or

thing, in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damage sustained in consequence of any such violations of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

SEC. 10. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act, may either make complaint to the board as hereinafter provided for, or may bring suit in his or their own behalf, for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any court of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the methods of procedure herein provided for, he or they will adopt. In any such action brought in the district court for the recovery of damages, said court may compel any director, officer, receiver, trustee or agent of the corporation or company, defendant in such suit, to attend, appear and testify in such case, and may compel the production of the books and papers of such corporation or company, party to any such suit. The claim that any such testimony or evidence may tend to criminate the person giving such evidence, shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

SEC. 11. The Attorney General, Secretary of State, Auditor of Public Accounts, State Treasurer, and Commissioner of Public Lands and Buildings, shall constitute a Board of Transportation, which board shall have power by a four-fifths vote to appoint three (3) secretaries to assist in the performance of the duties of said board, and they shall each be paid a salary of two thousand ($2,000) dollars per annum. Not more than two of the secretaries shall be appointed from the same political

party. The secretaries of the board shall take the oath of office prescribed for state officers, and shall enter into bonds to be approved by the Governor, in the sum of ten thousand dollars ($10,000) conditioned for the faithful performance of their duties. No persons in the employ of any railroad corporation, or holding stock in any railroad corporation, shall be employed as secretary.

SEC. 12. That the Board hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Board to perform the duties and carry out the objects for which it was created; and for the purposes of this Act, the Board shall have power to require the attendance and testimony of witnesses, and the production of all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation, and to that end may invoke the aid of any of the District Courts in this State, or of the Supreme Court, in requiring the attendance and testimony of witnesses, and the production of books, papers and documents under the provisions of this section; and any Court of competent jurisdiction, within the jurisdiction of which such inquiry is carried on, may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this Act or other person, issue an order requiring such common carrier or other person to appear before said Board (and produce books and papers if ordered) and give evidence touching the matter in question; and any failure to obey such order of the Court may be punished by such Court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be

used against such person on the trial of any criminal proceeding.

SEC. 13. That any person, firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Board by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Board to such common carrier who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Board. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Board to investigate the matters complained of, in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of absence of direct damage to the complainant.

SEC. 14. That whenever an investigation shall be made by said Board, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Board are based, together with its recommendation as to what reparation, if any, could be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall hereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found. All reports of investigations made by the Board, shall be entered of record, and a copy thereof shall be furnished to the party who may

have complained, and to any common carrier that may have been complained of.

SEC. 15. That if in any case in which an investigation shall be made by said Board it shall be made to appear to the satisfaction of the Board, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this Act, or any law *cognizable by said Board by any common carrier*, or that injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Board to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done or, both, within a reasonable time, to be specified by the Board; and if, within the time specified, it shall be made to appear to the Board that said common carrier has ceased from such violation of the law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Board, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Board, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

SEC. 16. That whenever any common carrier, as defined in and subject to the provisions of this Act, shall violate, or refuse, or neglect to obey any lawful order or requirement of the Board in this Act named, it shall be the duty of the Board, and lawful for any company or person interested in such order or requirement to apply in a summary way, by petition filed in the judicial district in which the common carrier complained of has its principal office, or in the district in which the violation or disobedience of such order or requirements shall happen, alleging such violation or disobedience as the

case may be, and the said Court shall have power to hear and determine the matter on such short notice to the common carrier complained of, as the Court shall deem reasonable, and said Court shall proceed to hear and determine the matter speedily as a court of equity, but in such manner as to do justice in the premises; and to this end such Court shall have, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint; and such inquiries as the Court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said Board shall be prima facie evidence of the matters therein stated; and if it be made to appear to such Court on such hearing or on report of any such person or persons that the lawful order or requirement of said Board drawn in question has been violated or disobeyed, it shall be lawful for such Court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Board, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such Court to issue writs of attachment, or any other process of said Court incident or applicable to writs of injunction or other proper process, mandatory or otherwise against such common carrier, and if a corporation against one or more of the directors, officers or agents of the same, or against any owner, lessee, trustee, receiver or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said Court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of five hundred dollars for every day after a day to be named in the order that such carrier or other person shall

fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the Court shall direct, either to the party complaining, or into Court to abide the ultimate decision of the Court, or in the treasury; and payment thereof made, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in personam in such Court. Either party to such proceedings before said Court, may appeal to the Supreme Court of the State, under the same regulations as now provided by law in respect to appeals in ordinary cases; but such appeal shall not operate to stay or supersede the order of the Court, or the execution of any writ or process thereon, and such Court may in every such matter order the payment of such costs and counsel fees as shall be deemed reasonable.

SEC. 17. That the Board may conduct its proceedings in such a manner as will best conduce to the proper dispatch of business, and to the ends of justice. A majority of the Board shall constitute a quorum for the transaction of business, but no member of said Board shall participate in any hearing or proceeding in which he is pecuniarily interested. Any party may appear before said Board and be heard in person or by attorney. Every vote and official act of the Board shall be entered of record, and its proceedings shall be public, upon the request of either party interested. Said Board shall have an official seal, which shall be judicially noticed. Either of the members of the Board, or of the Secretaries, may administer oaths and affirmations. The Board shall have authority to employ and fix the compensation of a stenographer for the use of said Board and its Secretaries, whose salary shall not exceed one thousand and five hundred dollars ($1,500) per year.

Said Board shall have the general supervision of all railroads operated by steam in the State, and shall inquire into

any neglect of duty or violation of any of the laws of this State by railroad corporations doing business in this State, or by any officer, agent, or employe, of any railroad corporation doing business in this State; and shall from time to time carefully examine and inspect the condition of each railroad in this State, and its equipments, and manner of conduct, and management of the same, with reference to the public safety, interest, and conveniences. It shall carefully investigate any complaint made in writing, and under oath, concerning any lack of facilities or accommodations furnished by any railroad corporation doing business in this State for the comfort, convenience, and accommodation of individuals and the public; or any unjust discrimination against either any person, firm, or corporation, or locality, either in rates, facilities furnished, or otherwise: and whenever, in the judgment of said Board, any repairs are necessary upon any portion of the road, or upon any stations, depots, station houses, or warehouses, or upon any of the rolling stock of any railroad doing business in this State, or additions to, or any changes in its rolling stock, stations, depots, station houses, or warehouses, are necessary in order to secure the safety, comfort, accommodation, and convenience of the public and individuals, or any change in the mode of conducting its business or operating its road is reasonable and expedient in order to promote the security and accommodation of the public, or in order to prevent unjust discriminations against either persons or places; it shall make a finding of the facts, and an order requiring said railroad corporation to make such repairs, improvements, or additions to its rolling stock, road, stations, depots, or warehouses, or to make such changes, either in the manner of conducting its business or in the manner of operating its road, as such Board shall deem proper, reasonable, and expedient; and said finding shall be entered in a record kept for that purpose, and said Board shall cause a copy of the same to be served on the said railroad corporation by any sheriff or constable in this

State, in the same manner as a summons is required to be served, and shall also transmit to the person, firm, or corporation interested, a copy of the same. Said railroad corporation shall, within ten days after being served with a copy of said finding and order, show cause, if any it has, why it should not comply with said order, by filing with said Board an answer verified in the same manner as pleadings of fact in the District Court are required to be verified. If no answer shall be filed, as aforesaid, then such finding and order shall be final and conclusive as against said railroad corporation. Upon the filing of any answer as provided for in this section, the said Board shall set a day, not exceeding thirty days from the date of the filing of such answer, for the hearing of the matter, and shall notify said Railroad Company, or any other person or persons, or corporations interested, of the time so fixed and the place of hearing the same; and shall carefully and fully investigate the matter, and for that purpose may subpœna witnesses and compel their attendance, and the productions of any books or papers, in the same manner as the courts of law of this State may do. After a full investigation of the matter said Board shall again make a finding of the facts and make such an order as it may deem just in the premises. If said railroad shall refuse or neglect to comply with such order the Board shall order the Attorney General or the County Attorney of the proper county to institute a suit to compel such Railroad Company to comply with such order, and it shall be the duty of the Attorney General or the County Attorney of the proper county, at the request of the Board, or any person interested in any such order or finding, to apply to the Supreme Court or to the District Court of any county through or into which its line of road may run, in the name of the State and on the relation of said Board, for a writ of mandamus to compel such Railroad Company to comply with such order; and upon the hearing of any such cause, such finding and order shall be as against such Railroad Company *prima*

facie evidence of the reasonableness of such order and of the necessity of such repairs, changes, additions, or improvements, or other matters in such order required to be done or omitted.

SEC. 18. That the principal office of the Board shall be in the City of Lincoln, where its general sessions shall be held; but whenever the convenience of the public, or of the party may be promoted, or expense prevented thereby, the Board may hold special sessions in any part of the State. The Board of Transportation or any member thereof or either of its secretaries may prosecute any inquiry necessary to its duties in any part of the State, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this Act.

SEC. 19. That the Board of Transportation is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Board may need information. Such annual reports will show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises and equipments; the number of employes and the salaries paid each class, the amount expended for improvements each year, how expended, and the character of such improvements, the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss, and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights or agreements, arrangements, or contracts with other common carriers, as the Board

may require, and the said Board may, within its discretion for the purpose of enabling it the better to carry out the purposes of this Act, prescribe (if in the opinion of the Board it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

SEC. 20. Said Board shall, on or before the first Monday in December of each year, make a report to the Governor of their doings for the preceding fiscal year ending June 30. This report shall contain such information and data collected by the Board as may be considered of value in the determination of questions connected with the regulation of commerce in the State, together with such recommendation as to additional legislation relating thereto as the Board may deem necessary.

SEC. 21. That nothing in this Act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, state or municipal governments, or for charitable purposes, or to and from fairs and expositions for exhibition thereat, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of the Gospel; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers or employes, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies to their officers and employes or others, and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

SEC. 22. To carry out the provisions of this Act without undue burden to the State officers who compose the Board of

Transportation, their secretaries are hereby empowered in all matters of examination or investigation, to perform the duties prescribed for the Board themselves:

Provided, That all final decisions shall be made by the Board themselves.

SEC. 23. That articles five and eight of chapter seventy-two of the Compiled Statutes of Nebraska for 1885, and all Acts and parts of Acts inconsistent with the provisions of this Act, are hereby repealed.

49 So. 51

Nos. 310, 311 and 312. 1897

Opp'n to Brf. of Woolworth for Appellees.

Supreme Court of the United States.

Filed Apr. 9, 1897.

THE NEBRASKA FREIGHT RATE CASES.

Nos. 310, 311, and 312.

Memorandum of Evidence upon the Value of the Properties.

The Burlington.

Mr. Taylor, the auditor of the company, who in one capacity or another has been in the accounting department ever since the construction of the road was begun, says that the same cost $74,616,523.02, including original construction, betterments, &c. (pages 1290–1300). He also says that the mileage of the Burlington is 2,253.07 (page 584), which would give about $33,000 per mile.

There is no suggestion in the record that the road was not honestly and economically built.

There is no direct proof of present value, but Mr. Taylor says that some of the properties are worth much more now than they were when acquired.

Union Pacific.

Mr. Morgan was an engineer, called to their assistance by the Paterson Commission, which was charged by Congress with the examination, among other things, of the

condition and value of the road. From his report several extracts are made, and one is an estimate of the cost of reproducing the road (page 1134 of the record), which shows the cost per mile to be $26,814. This does not include terminals.

Mr. House, who was one of the original corps of engineers, affirms that estimate (823).

Mr. Calvert, who had been at first resident and afterwards chief engineer of the Burlington, in Nebraska, and was superintendent of that road when he testified (1254), says that the cost and value of a road which had become mature by time and expenditure was from 33⅓ to 50 per cent. greater than one just built (1264), which would increase the estimate of Mr. House and Mr. Morgan to from $35,752 to $40,221.

To this a large sum should be added for terminals which Mr. Morgan estimates at $10,000,000 (1150). Mr. House estimates them at $3,973,912 (1643). Either sum swells the cost of reproduction very largely.

The Elk Horn & Omaha Roads.

The testimony is imperfect as to the present value and costs of these roads. It will be found on pages 1547–1580. It is definite enough for the Omaha terminals and can only be estimated for the rest of the property.

J. M. WOOLWORTH.

#49 50 51.
Nos. 310, 311 & 312
Supreme Court, U. S.
FILED.
APR 9 1897
JAMES H. McKENNEY,
CLERK.
Supreme Court of the United States.

Nos. 310, 311, and 312.

THE NEBRASKA FREIGHT RATE CASE.

Mr. Carter's notes relating to the course of decision, and questions decided, and left open.

Munn *v.* Illinois, 94 U. S. 113.

The exercise of legislative authority fixing maximum rates is expressly placed by the opinion on the police power (pp. 124, 125).

Illustrations are given of instances in which it had been exerted, such as that in England, from time immemorial, and in this country from its colonization, it had been customary "to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, &c., and in so doing to fix a maximum of charge, &c;" but instances of regulation of *charges* very few.

He passes to the principle upon which this stands and puts it on the ground that when private property is affected with a public interest, it ceases to be *juris privati* only, and cites Hargrave *de partibus maris*, and *De jure maris* and Aldnut *v.* Linglis, 12 East, 527, all which are to the effect that in such cases reasonable compensation only can be charged, and if more is charged the

party is punishable; but nowhere said that prices can be properly fixed by legislation.

He cites also the act of Congress of 1820 giving the city of Washington the right to make regulations for hackney, carriages, draymen, &c., and to make rates of fare.

From this he reaches the conclusion that the State has right to fix maximum charges in case of elevators, and thus determine what is reasonable.

He even says that the common-law rule requiring a reasonable charge is but a regulation of conduct, and is entirely within the control of the legislature.

No relief against any law fixing charges but by an appeal to the people.

In subsequent cases, C. B. & Q. R.R. *v.* Iowa (94 U. S. 155), and others, decided at the same time, the same doctrine was applied to railroads.

This meant that the law with us was the same as in England, where Parliament was absolute. The constitutional safeguards could not be invoked.

There was no question in this case concerning the propriety of the rates as maximum rates. The question was whether there was any legislative power to deal with rates at all.

In two subsequent cases (Ruggles *v.* Illinois, 108 U. S. 526, and Illinois Central R.R. Co. *v.* Illinois, *ib.* 541), Munn *v.* Illinois was followed. There was nothing to show that the fare fixed by the State was unreasonably low. Harlan, concurring in the result, dissented from some of the reasoning of the majority on the ground of a grant in the charter enabling the company to fix rates, although not naming amounts.

The contention in these cases was that there were *ex-*

press provisions in the charters of the companies which took the cases out of the operation of the prior decisions in Munn *v.* Illinois and the other cases decided at the same time.

In these cases, apparently, the Chief Justice adhered fully to the doctrine of his opinion in Munn *v.* Illinois, that in the absence of any provision in the charters giving a right to particular rates, the whole subject of rates, reasonableness, and all was within the legislative authority.

The dissent of Justice Harlan was on the ground that the provisions of the charters gave the companies power to fix *reasonable* rates; that this made a contract, and the question of reasonableness became a judicial one; but that this consideration could not affect the decision on account of want of proof that the legislative rates were unreasonably low.

In Railroad Commission Cases (116 U. S. 307, 330, 331), the same learned judge (Waite, C. J.) affirmed the same doctrine, that it was competent to the legislature to determine what were in fact reasonable rates. But now, with most important qualifications, he said, "the power to *regulate* is not the power to destroy," and that it had its limitations. But he did not put this limitation expressly on constitutional grounds, although later (at page 335) he seems to imply that the protection was to be found in the Constitution.

Judge Harlan dissented on the ground that the case differed from the railroad cases above referred to, decided at same time with Munn *v.* Illinois, because in those cases there were no provisions in the charters conferring rights or powers upon the companies in respect of rates, whereas in this case the charter of the company (The Mobile & Ohio Company) expressly gave to it the power to fix rates. He held that this was a valuable right, acquired by contract,

which could not be taken away and that State legislation prescribing rates was in conflict with it (pp. 337–340).

Dow v. *Berdelman* (125 U. S. 686) arose on a law of Arkansas, fixing three cents a mile fare for passengers. It was an action to recover penalty.

Here, for the first time, there was an allegation that the rate was unreasonably low. The doctrine of Munn *v.* Illinois was affirmed, but the question whether the rate was unreasonably low was entertained, under the qualification stated, as above mentioned in the Railroad Commission cases, and it was said that there was *no sufficient evidence* to show that the rate was unreasonable. Mr. Justice Gray, in giving the opinion, said, however, "Without any proof of the sum invested by the reorganized corporation or its trustees, the court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the legislature is unreasonable."

Chicago R.R. & St. Paul Co. *v.* Minnesota (134 U. S. 418).

This case raised one aspect of the question very sharply. The statute of Minnesota established a commission and gave it authority to fix rates, and declared that the rates thus fixed should be final and conclusive on the point of reasonableness, and that there should be no judicial inquiry. This went straight beyond police power. A mandamus was sought in a State court to compel the plaintiff in error to comply with the rates; but the company set up that that rate "was not a reasonable, fair, or just compensation," and asked for a reference to take testimony, which request was refused and a peremptory writ was ordered. It was conceded there was no contract or charter right to interfere with the full exercise of legislative power.

The question was squarely presented, whether the court

would sanction an attempt by a State to enforce rates fixed by its legislature, without regard to the question of reasonableness; in other words, with whom *vested the decision of the question of reasonableness, the legislature or the courts.*

The court reversed the judgment of the State court expressly on the ground that that was a question for the courts. It said: "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination."

Justices Bradley, Gray, and Lamar dissented, and the former brought out the difference still more sharply. He said: "It is urged that what is a reasonable charge is a judicial question. On the contrary, it is pre-eminently a legislative one" (p. 462); and further: "This is just where I differ from the majority of the court. They say, in effect, if not in terms, that the final tribunal of arbitrament is the judiciary. I say it is the legislature."

Chicago Grand Trunk R.R. *v.* Wellman (143 U. S. 339).

Michigan fixed rates. Passenger tendered State rate and demanded a ticket, which was refused, and he brought suit for damages. A statement of facts had been agreed upon, and upon this statement a verdict was asked for defendant, which was refused, and the court directed verdict for plaintiff.

On writ of error judgment was affirmed by this court, but on the ground that the court could not say, on that mere showing, that the rate was too low and the act unconstitutional. The statement did not sufficiently show the unreasonableness. Justice Brewer gave the opinion,

and said that the doctrine of the court was that the State had power to fix rates, and that the extent of judicial interference was protection against unreasonable rates.

Reagan *v.* Farmers' Loan and Trust Co. (154 U. S. 362).

Texas established a commission which fixed rates. Appellees filed a bill in U. S. Circuit Court for an injunction, alleging that they were insufficient. There was a demurrer. Decree for complainant was affirmed in this court.

Justice Brewer gave the opinion. In it he said: "If the charter had, in terms, granted to the corporation power to charge and collect a definite sum per mile for the transportation of persons or property, it would not be doubted that that express stipulation formed part of the obligation of the State which it could not repudiate. Whether, in the absence of an express stipulation of that character, there is not implied in the grant of the right to construct and operate, the grant of a right to charge and collect such tolls as will enable the company to successfully operate the road, and return some profit to those who have invested their money in the construction, is a question not as yet determined."

He goes into the allegations of the bill and holds them sufficient to call upon the court to restrain the enforcement of the rates.

Full array of authorities in the briefs of counsel.

St. L. & San. Fran. R.R. Co. *v.* Gill (156 U. S. 649).

Rates fixed directly by the legislature and with penalties. Action to recover penalty. Judgment below for plaintiff. Writ of error to Supreme Court.

Shiras, J., gives opinion. Reviews decisions. States that court has held that there is a judicial remedy where

rates are fixed at so low a point as to practically destroy the property. Enters on the question of fact. Finds that the defence consisted in offers to show that rates were destructively low only over *part* of the line. The whole road was composed of three consolidated lines, two in Arkansas and one in Missouri; and offer was limited to that part consisting of one of the consolidated lines. Held that this was not enough; that railroad had no absolute right to a profit over each mile, or each part of its road.

The last case, Covington & L. Turnpike Co. *v.* Landford (17 Sup. Ct. Reporter, 198).

Case of Turnpike Co. Rates fixed by legislature. Bill by neighboring citizens accustomed to use road to enforce it from exacting higher rates. Plea that rates allowed by the statute were not sufficiant to enable road to discharge its duties to the public and pay any dividends to stockholders, and demurrer sustained in Kentucky courts, and appeal to this court.

Harlan, J., gave opinion reversing decree and holding plea good. Reviewed cases, quoting with approval parts of Brewer's opinion in Reagan case. He also said, *inter alia*, that the court could not say, on the record, that the company had the right to earn 4 per cent.; that every case must depend on its own facts; that "the utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature when exerting its general powers is that it shall receive what, under all the circumtances, is such compensation for the use of its property as will be both just to it and to the public."

Part of the extracts from Brewer's opinion in the Reagan case cited with approval: "If the State were to

seek to acquire the title to these roads under its power of eminent domain, is there any doubt that constitutional provision would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by any act of the legislature? Is it any less a departure from the obligations of justice to seek to take, not the title, but the use, for the public benefit at less than its market value?

Points Determined by the Lines of Decisions.

1. That in the absence of provisions in the charters constituting *contracts* between the State and the company limiting the legislative power in respect to rates, the legislature has the power to fix *maximum* rates.

2. That this legislative power is not unlimited, and that it does not extend so far as to permit rates to be established which will yield no return upon the investment and thus practically destroy the property.

3. That the question of what rates are reasonable, and what are unreasonable, is a judicial and not a legislative question.

Points Left Open to Discussion.

1. What is the *nature* of the *legitimate* power which the legislature may exercise upon the subject of rates? It was in substance declared, in the opinion in Munn *v.* Illinois, that it was the *police* power, but the real character of this power and its limitations were not then, and have not since been, much considered.

2. Where there are no express provisions in the charters respecting the amount of rates or the power to fix them, is there any implied grant of a right to charge

reasonable rates? Does not the right to *take tolls* necessarily imply a power to take tolls to some certain amount or to some amount capable of being made certain? Can we help saying that it is a right to take reasonable tolls?

3. Can the court, when declaring that rates cannot be fixed at so low a point as to yield no return, because that would be a taking of property, stop at that point? If taking *all* profit is a destruction of property, does that destruction *begin there?* Does it not begin when the profit is reduced to a very small amount? And, therefore, is it not necessary to fix a point at which destruction begins, and can it be fixed anywhere except at the point of *reasonableness?*

Tendency of this Line of Decision.

It is very plain that there has been a *regular progress* thus far, entirely in harmony with constitutional doctrine. It is clearly developed by limiting the decisions to the actual circumstances of the cases decided, and treating the language of opinions with the liberality which a true criticism enjoins. The progress is as follows:

1. The question first presented was whether the legislature had any power whatever to deal with rates. This was decided in the affirmative.

2. When the question was made whether provisions in charters not granting the right to specific rates, but permitting companies to fix reasonable rates, a decision was not compelled, because the proofs did not show the statutory rates to be unreasonable. Opinions differed.

3. When the suggestion was first pressed whether those judges who sanctioned the fullest exercise of legislative power would allow no limit to it, some of them, including Waite, C. J., himself, answered that the power

did have its limitations; and when the question was first squarely made the majority held that it was limited.

4. When cases have been presented in which it was claimed that the rates were unreasonably low, but not clearly shown to be so, the court has declined to interfere.

5. When cases have been presented where the rates did not allow any substantial return on the capital, it has been unanimously held that the limit had been reached and passed, and the laws were held invalid.

6. The case seems not yet to have arisen where the rates were proved to reduce return to a clearly unreasonable point, although not taking away all profit.

7. In recent cases the question has been mooted, and repeated in the very last decision, whether there is not an implied right under all charters to reasonable rates. Whenever this question presents itself in a manner not to be avoided, the affirmative will be found to be the only decision to which the foregoing tendencies lead, or which constitutional law can sanction.

Extracts from British Statutes.

3 Wm. & Mary, Chap. XII, s. 35.

In a statute relating principally to carriers, &c. "And whereas divers waggoners and other carriers, by combination among themselves, have raised the prices of carriage of goods in many places to excessive rates to the great injury of trade: be it therefore enacted by the authority aforesaid, that the justices of the peace of every county and other place within the realm of England or dominion of Wales shall have power and authority and are hereby enjoined and required at their next respective quarter or general sessions after Easter day yearly to assess and rate the prices of all land carriage

of goods whatsoever to be brought into any place or places within their respective limits and jurisdictions by any common waggoner or carrier," &c., to certify the rates to mayors and chief officers of market towns, to be hung up in public places. Waggoners and carriers prohibited from charging more under penalty of five pounds.

7 & 8 Geo. 4th, Cap. 39.

The foregoing act and another similar one passed in 21st Geo. 2d were recited and then further recited, "And whereas the provisions hereinbefore recited are at present inoperative and inapplicable to the present times and it is expedient that the same should be repealed: Be it therefore enacted," &c., that the same and all other provisions relating to rates of the carriage of goods be repealed.

This is the British legislation referred to, but not quoted, by Waite, C. J., in his first railroad decision. (Chicago & R.R. Co. *v.* Iowa, 94 U. S. 155, 162.)